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Information as to Denver Meeting

ARRANGEMENTS for the forthcoming annual meeting at Denver are now being made as rapidly as possible by the Committee of the American Bar Association and the Colorado Committee at Denver. In the March issue, we expect to print a complete list of the hotel accommodations, with rates and such other details as are available at that time. The hotel selected for the headquarters will, we understand, then be announced.

Against "Frozen Endowments"

THE legal profession and the medical profession are showing a common interest in another matter besides solution of the problems connected with expert testimony, namely, in a campaign against "frozen endowments." By this term is meant "funds permanently dedicated to restricted objects and endangered by obsolescence as those particular purposes become antiquated." Not long since, an appeal was made to the public, signed by a distinguished group of medical men, including ex-presidents of the American Medical Association and leading members of other recognized bodies of the profession, calling attention to some of the difficulties that arise from the attempt of testators, in establishing funds for various purposes, to forecast the course of events for an indefinite period. Recently, also, a commission of fifteen well-known lawyers of the country has issued a statement as to this problem and recommended the Community Trust plan as a specific method of dealing with it.

"Every experienced attorney," the statement says, "has had occasion to witness the unfortunate effects frequently attendant upon the inclusion of inflexible conditions in wills and trust agreements creating 'charitable trusts.' The history of these charitable trusts—established frequently in perpetuity—has demonstrated that their effectiveness would have been increased and the welfare of mankind promoted if their terms had made provision for possible changes in the particular beneficiaries originally chosen or in the channels selected for the application of the funds; this for the reason that the passage of time, the progress of civilization and the increasing concern of the state in matters affecting public welfare are constantly rendering trusts created for specific purposes obsolete or superfluous and making literal compliance with their terms unwise or impossible." These lawyers suggest that members of the profession drafting instruments creating trusts for charitable purposes give consideration to the administrative machinery made possible by the New York Community Trust Plan, under which provision is made for the custody and distribution of the fund in accordance with the testator's desires, with a further provision authorizing the distribution committee to act in his behalf if changed conditions in the future make a different disposition necessary or desirable to accomplish more adequately the general charitable objects of the grant.

Special Meeting on Bar Organization

PRESIDENT CHESTER I. LONG of the American Bar Association has appointed Frederick A. Brown, Wm. P. MacCracken and Walter H. Eckert, all of Chicago, a special committee to cooperate with the Conference of Bar Association Delegates in regard to the forthcoming special meeting of that Section, to be held at Washington, D. C., on April 28.

Chairman Charles E. Hughes of the Conference has recently sent the following letter to Presidents

and Secretaries of State and local Bar Associations in connection with this very important event in the history of the bar:

"Feb. 8, 1926.

"Dear Sir:

"In compliance with the action of its Council with the concurrence of the Executive Committee of the American Bar Association, a meeting of the Conference of Bar Association Delegates is called, to be held in Washington, D. C., Wednesday, April 28, 1926, to consider means for advancing legislative action officially organizing the State bars of the several States.

"The program of the meeting will include the following:

"1. Reports from the State bars of the several States in which the bar of the State has been officially organized under legislative enactment.

"2. The progress which has been made toward favorable legislative action in States where bar association bills are now pending in the legislatures.

"3. Reports from State bar associations where the subject matter has been acted upon or is still under discussion.

"4. The form of act necessary where constitutional provisions limit the powers which may be given an officially organized State bar.

"5. A general discussion of the advantages to be gained through official State bar organization.

"6. Action by the Conference.

"The meeting of the Conference will precede the meeting of the American Law Institute, and the officers of these two organizations have under discussion plans looking to cooperation in the matter of a reception at the White House, a dinner, and an exchange of courtesies which should tend to increase the success and interest of both meetings.

"We should know at the earliest moment who are coming, and I am therefore urging you to send your list to Mr. Herbert Harley, secretary, 920 City Hall, Chicago, as soon as possible.

"The American Bar Association sends five delegates, while each State bar association is entitled to three and each local bar association to two delegates. In order to insure full representation, it is suggested that alternates also be named and they will be given the privileges of the floor.

"The movement for legislation providing for the official organization of our State bars is one of the hopeful means for the attainment of a more orderly and efficient administration of justice, and it ought to command our earnest and self-sacrificing support.

Faithfully yours,
CHARLES E. HUGHES,
Chairman of the Conference of Bar Association Delegates."

Agenda for Meeting of Commerce Committee

WE have received the following notice from the Chairman of the Committee on Commerce, Trade and Commercial Law relative to the hearings to be conducted in New York City:

The Committee on Commerce, Trade and Commercial Law of the American Bar Association will

hold a public meeting in the Chamber of Commerce Building, 65 Liberty Street, New York City, Tuesday, Wednesday and Thursday, April 13, 14 and 15, 1926, for discussion and recommendation by all persons interested in the subjects appearing upon the agenda or that may be appropriately added thereto.

The Committee cordially invites all persons interested in any of the subjects mentioned to meet with the Committee at the time stated for their consideration, and those unable to attend in person are requested to submit written suggestions. Sessions of the meeting will open promptly at 10 A. M.

Tuesday, April 13, 1926

10 A. M.

1. Suggestions of
   (a) New Business
   (b) Other subjects

11 A. M.

1. A Bill providing for damages in collision cases on navigable waters of the United States where more than one vessel is at fault.

2 P. M.

1. Act relating to bills of lading, inter-state and foreign commerce, being Senate Bill No. 2959 of the 68th Congress.
2. Senate Bill 2915, Amendments to Pomerene Bills of Lading Act.
3. Senate Bill No. 77 relating to payment of interest on judgments against the United States.

Wednesday, April 14, 1926

10 A. M.

1. Bill relating to a United States Industrial Court.

11 A. M.

1. Senate Bill No. 1006—United States Sales Act.

2 P. M.

1. Bill relating to motor vehicles in inter-state commerce and upon highways receiving United States aid.

Thursday, April 15, 1926

10 A. M.

1. Instruments relating to negotiable paper, fire insurance policies and warehouse receipts.
2. Such amendments to the Bankruptcy Act as have been referred by the Association to the Committee.

11 A. M.

Executive Session.

PROVINCE M. POGUE, Chairman.

Special Notice to Members

No doubt you are planning to attend the Annual Meeting to be held in Denver, July 14th, 15th and 16th. The Secretary's office has undertaken to ascertain how many of the members would be interested in taking a trip through one or more of the National Parks after the meeting is over. Please fill out at once the questionnaire which you will find on Page 136 of this issue and mail to the Secretary.

THE PROBLEMS OF THE LAW

Current Ideas as to Lay Competency to Overhaul the Law and Achieve Effective Reforms by Legislation—Mistaken Attitude of Lawyers Toward Reform Movements in Past—Legal Order Distinguished from Aggregate Body of Legal Precepts—Three Elements of Law—Practical Importance of Pure Legal Science—Problems of Today*

By Roscoe Pound
Dean of the Law School of Harvard University

LADIES AND GENTLEMEN: I suppose, having been introduced to you as a professor, I shall be expected to exhibit myself in one of the well-known professorial roles; for I suppose a professor, by virtue of his office, is expected to be a heretic or a pedant, or an amiable moron. He is very apt to be a heretic because some years of continuous study of some particular subject is likely to make him a bit skeptical about those offhand generalizations which we all of us know are beyond question, and a bit skeptical about those offhand final solutions of the question that is uppermost for the moment upon which everyone is agreed—to doubt which, therefore, is nothing short of the crime of heresy. He is not unlikely to be a pedant because those same years of continuous, protracted, thoroughgoing study of some subject are not unlikely to make him feel cautious about talking of anything unless he is clear that he understands it, and to question the possibility of understanding it unless he entertains some ideas and uses some words which, as Kipling used to put it, are apt to be most filthily technical. And so he is not unlikely to feel that he may devote such energies as he has more profitably to the subjects with which he is immediately concerned, if, instead of dodging heresy hunters, and trying to expound and explain the unexplainable in words of one syllable, he appears simply in the role of an amiable moron, and makes some casual remarks, not with professional profundity, but with individual imbecility. Now I am moved this evening to combine those three roles. In the role of a heretic I am going to venture to question some notions that are pretty thoroughly grounded, and in particular to suggest to you the utterly heretical notion that it is possible to achieve some practical things for making smooth the path of justice in this country through the science of the law, and through research in law. In the role of a pedant, I have prepared an elaborate manuscript, which I have here and in which I have developed those heresies at a good deal of length; but in the role of an amiable moron, I am going to put it back in my pocket, and take leave to print, and if the stenographers will take it from me that the manuscript is all here, and contains exactly what I shall say in the exact language with which I am going to say it, I will endeavor to give you the gist of it in an informal fashion.

A recent editorial in a conservative metropolitan newspaper tells us that whereas our legislatures are filled, and always have been filled with lawyers (it would perhaps be more accurate to say "with members of the bar") the effort of those legislatures to make the administration of justice more effective for its purpose, despite the huge biennial output of statutes, has no effect beyond increasing the density of what the editor is pleased to call the legal fog. His conclusion is that we shall have to call upon the business man and the worker to do what lawyers (in the legislature at least) are failing to do, and in some manner not specified, make American administration of justice equal to its task in the society of today.

In this editorial, which is typical of much that has been said and written by editors, and preachers, and writers in recent years, there are three points which have interest for us. One is the underlying assumption that the public administration of justice in present-day America is not what it should be, and that something must and will be done about it; if not by lawyers, why then by the public at large. Another is the assumption that the lay public are entirely equal to the task and that it is only natural preference of those whose life work is in other fields for devoting their energies to those fields, that makes it desirable that the lawyers, if they will, should take the lead in adapting our legal machinery to the things which are to be done in the twentieth century. The third is the assumption that whatever is done for the improvement of American administration of justice will as a matter of course be done through legislation; that the measure of the lawyers' opportunity is to be found in the relative number of lawyers as compared with laymen in our legislative assemblies, and that the measure of the lawyers' failure to rise to the demands of that opportunity is to be found in the notorious deficiencies of our statute books.

We may grant the first of these assumptions. Here the laymen is perfectly competent to judge. If the general security is not assured, and in most of our large cities it palpably is not; if the conduct of business and the security of transactions are impeded by inelastic legal conceptions involving experience of a simpler economic organization, which have no place for the every day agencies of manufacturing and marketing of the complex economic organization of the present; if our methods of adjusting controversies and the organization of our courts and of judicial administration result in delay and expense and make lay administration, with its notorious defects, preferable to exact judicial ascertainment of legal rights and duties; if, in short, our legal machinery, when looked at functionally, is in many respects ineffective and inadequate, no one is more likely to know it than the layman whose causes are ground through the legal mill, who pays the bills, and pays the taxes that keep the mill in operation.

Conceding the first assumption, let us turn to the second and third. When farmers, feeling acutely the

*Address delivered at the annual meeting of the Kansas State Bar Association at Emporia, Kansas, Nov. 25, 1925.

results of some economic maladjustment, propose to apply their common sense to economic affairs and embody the product in legislation, the same editor who would turn our legal machinery over to legislative tinkering by "business men and workers" would not hesitate to pronounce those farmers "visionary radicals." Not long ago, before the rebirth of medicine, many felt competent to treat disease by application of lay common sense, and the family medicine chest was a feature of every household. A certain number of fortunes made in the manufacture of patent medicines may serve to remind us of those good old credulous days. But suppose today lawyers were to say to the medical profession: "You have been at work upon cancer quite as long as we have been at work on the legal problems of overgrown American cities. You have had enormous sums and elaborate facilities for research. You have announced many discoveries, and yet people go on dying of cancer in increasing numbers. Therefore, we must turn this problem of cancer over to the business men. By the application of business common sense they will deliver us from this scourge."

If any of us were to speak in this wise, he would be held to be quite unsound. Yet it does not seem to be held radical or visionary or absurd to suggest that legal and judicial experience and the lessons and teachings of legal history, and the results of legal and judicial science may be thrown into the waste basket, and the solution of delicate and difficult problems of maladjustment of human relations and regulation of human conduct be turned over to those whose experience and training are in wholly different fields.

After the Revolution, when transition from the simple conditions of Colonial America to the era of economic and political expansion put a heavy strain on the administration of justice, there was clamor for lay judges, for an American code to be made without regard to the legal experience of the past by American common sense, and for a wholesale rejection of what agitators were wont to call the quirks and quibbles of English law. This agitation has left its mark upon our institutions in inadequate provision for the training of lawyers, in exaggerated powers of juries, and in fetterings of trial judges, in more than one of our commonwealths. More than one unhappy feature of American administration of justice, which is a factor in the conditions of which complaint is made so justly today, is a result of short-sighted, ignorant application of lay common sense to difficult problems of law and of judicial organization and administration, which called, not for common sense, but for the uncommon trained sense of experts.

Again, when the elaborate formally over-refined, cumbersome, expensive, legal procedure of the eighteenth century required overhauling with the rise of commercial litigation, the rise of tort litigation, and the demand for expedition in a time of economic growth, and a land of push and rush and restless change, lay common sense was invoked once more by an impatient public, confident in American versatility and affected, it may be, by the cult of incompetency which is an unhappy by-product of democracy. More than one bad feature of the reform of American procedure that swept over the country after 1850 is traceable to lay application of the legislative steamroller to problems that did not admit of that sort of solution. And this is even more true of our administration of criminal justice. Nowhere has lay insistence upon legislative tinkering with details, without regard to the legal setting of those details, been more continuous and persistent. Nowhere have the courts been more tied down by minute and detailed provisions than in criminal law and criminal procedure. When complaint is made as to the multitude of laws, and bloated statute books, it should be remembered that the pressure for more laws and the annual infusions that bloat the statute book, come not from lawyers, but from laymen. Every trade or business has its legislative committee. Those who cry out the loudest for fewer laws are often the first to urge upon the legislature some new special legislative project which, like one of Rip Van Winkle's drinks, is not to count.

Thus it will be seen that so far we have relied upon legislative application of lay common sense, or upon the slow progress of development of doctrines and the experience of decision of litigated causes. We have not found it necessary in the past to lay much foundation for legislation, nor has any foundation beyond technical professional training been thought necessary for the finding of law by judicial decision. Today, however, when the last census tells us we have definitely shifted from a rural, agricultural society to an urban industrial society, we are becoming acutely aware of the deficiencies in our lawmaking, and are impelled to consider how far we are from anything which ought to lead us to expect that process to be competently carried on.

Lawyers are not without blame for the prevalence of ideas as to lay competency to overhaul the law and achieve effective reforms by legislative formulation of the general will. Our classical political theory is one of law as declared popular will. It does not distinguish the source of the law's authority from the formulating agency behind the law's precepts. It gives the impression that the words "Be it enacted" suffice to justify everything that follows. On the other hand, our current juristic theory is historical. It holds that law cannot be made consciously or deliberately; it can only be found. It is skeptical as to the efficacy of conscious effort at improvement. It expects law to grow, as language does. It expects legal institutions to evolve themselves by the inherent power of the idea of right or the idea of freedom unfolding in human experience. In consequence, it transfers the reverence which is due to the legal order from that legal order to the precepts for the time being by which we seek to uphold it. It blinds lawyers to the ill-functioning of those precepts. It leads them to overlook possibilities of doing things better and achieving the ends of law more efficaciously with improved legal machinery. It tends to sanctify in their minds the details of legal precepts and leads them to assume that in touching any of these precepts, even on the most palpable grounds, and for the plainest purposes, the legislature is endangering the social fabric. On the one hand, we have a theory that invites lay tinkering. On the other hand we have a theory that decries professional activity to improve the administration of justice and leads the lawyer to assume an attitude of obstruction where he might easily take the lead in constructive exercise of creative activity.

It is worth while to recall that if lawyers have to their credit great achievements in the working out of a common law in England, and later in the adaptation of that common law to America and the reshaping of its materials to the requirements of life in the new world, they are chargeable with great mistakes in their attitude with respect to nearly every important movement for improvement in the administration of justice

in our legal history. When common-law lawyers extol the jury it is well to remember that the author of the Mirror of Justices set it down as an abuse that Englishmen were no longer permitted to try issues of fact by battle, but were required by law to submit issues to a jury. When we look with pride upon the liberalization of the legal system by means of equity, we need to remind ourselves that when the jurisdiction of chancery was formative it was bitterly resisted by common-law lawyers, and that when in this country, in the last quarter of the nineteenth century, the last of our commonwealths finally gave complete equity jurisdiction to its courts, the act was vehemently opposed by the most learned and eminent judge of the State—a justice of the Supreme Court of the United States—who prophesied many ill results. When we claim credit for the development of commercial law at the end of the eighteenth and in the nineteenth century, and admire the effective strokes of Mansfield to make straight the paths of justice in commercial affairs, we must not overlook that one of the most liberal of American lawyers resisted adoption of the common law for his state, as of the time of the Revolution, because of objection to what he called "Mansfield's innovations." We must remember that the legislative reform movement in nineteenth-century England, which is now justly held to be a landmark in legal history, was fought inch by inch by some of the ablest lawyers of the day, and was regarded with abhorrence by lawyers whom the profession still reveres.

Our own relatively short history tells the same story. The Constitution of the United States is one of the outstanding documents of Anglo-American law. It is justly revered by the lawyers of today. But when it was first drawn and was submitted to the people for adoption it encountered the most determined opposition from the leaders of the profession. The lawyers who favored it were young and of little experience or standing. Eloquent speeches against it were made by lawyers whose fame still endures. Moreover, the grounds of their objections were that the instrument would be dangerous or even fatal to liberty; whereas today lawyers have come to recognize it as the chiefest safeguard of liberty. Again, it is instructive to read what lawyers had to say when married women's acts were first proposed; what they had to say when statutes first gave rights to mothers with respect to custody of their children; what they had to say when homestead laws were first enacted, and what they prophesied when common-law procedure was overhauled in the middle of the last century. To come to recent times, we need to compare with the foregoing the report of a group of eminent New York lawyers, when a project for amendment of the State Constitution so as to admit of a workmen's compensation act, was before the people of that State. Truly not the least warning of legal history is one against confident prophecy of disaster when changes are made in the law. The very spirit of the profession that leads to these prophecies is our best guarantee that they will not be fulfilled.

In the law, as everywhere else, we must rely upon those who know the problems to be met, know the materials with which they are to be met, know the art of the craft that will apply the materials, and know something at least of the experience of the past out of which those materials have been wrought. And yet so long as lawyers persist in an attitude of juristic pessimism, so long as they decry the doing of things by laymen and do nothing themselves, we must expect the public to strike out blindly in the endeavor to do the best they may, when bad situations arise and are suffered to continue. Ours is not the only profession which from time to time has to be reminded that it is a practical profession, charged with attaining practical results. Charlatans and quacks and miracle workers have more than once had to wake the medical profession from a period of dogmatic slumber. The military profession has been rudely awakened more than once when volunteer non-professionals have led the way while professionals were waging wars of the present with the tactics and armament of the past. It has happened more than one that a movement from the outside has led to advance in naval operations, when the professionals had become fixed in an obsolete routine. These things do not mean that we can put our trust long or much in the non-professional. In a highly specialized world the tendency is toward more rather than toward less reliance upon the specialist. There is the more reason, therefore, why the professional in every field should feel bound to look at his profession functionally. It does not exist for its own sake. It is a means toward human ends. How far it achieves those ends and how far it falls short and why must be his constant study. And this will lead to study of how far it may achieve them better and by what means. Panegyrics upon law in the abstract, lectures on the constitution, and exhortations to obedience of law, will do nothing in comparison with intelligently directed effort to ascertain how the law works, where it does not work and why, and how it may be made to work. Only when this has been done and done well, shall we make enduring progress toward a régime of universal respect for the legal order.

Respect for law in the sense of respect for the legal ordering of relations and of conduct, which are at the foundation of civilized society, does not mean that particular legal precepts or particular legal institutions are to be beyond question. Law is the strongest agency of social control. It bears the brunt of the task of maintaining, furthering and transmitting civilization. This is a universal task. The task of particular precepts and particular institutions, on the other hand, by which we seek to maintain the legal order in any given time and place, is relative to time and place and men and economic and social conditions. An inquiry into how far they are adapted to the time and place and economic and social conditions, is always in order. For when we speak of the law as sacred, it is not law as an aggregate of rules of law that we have in mind, but law in the sense of the legal order. In truth we may easily injure the legal order by regarding each item of the body of legal precepts for the time being as sacred. Sooner or later each particular precept will change or become obsolete or be superseded, and yet the legal order may remain unimpaired. The ambiguity of the term "law" that makes it easy to think of law as only a body of rules of law, is quite as much a menace to the legal order on one side as over confident lay trust in legislation is upon another side.

If by "law" we mean the organized mass of materials by which justice is administered in the modern state, law is made up of three elements. First, there are legal precepts—the element we have in mind when we think of law as an aggregate of laws. The analytical jurist has his eye on this element when he frames his theory of law as the command of the state. It is because the legislator has his eye exclusively on this element and mistakes it for the whole, that he so

often fails in his well meant endeavors to make law. In the application of the precepts he has devised so ingeniously and formulated so carefully, some things constantly come into the result which his calculations have left out of account. Trained in a theory of law which also leaves them out of account, he is not unlikely to assume that dishonest or inefficient officials, or a bad machinery of justice, or inherent bad tendencies in the legal profession, or a decadence in the morale of the people, or all of these things, are chargeable with miscarriage. But it is more than likely that the intruding and disturbing element is the law itself, into which his legal precept did not fit, and to which it has had to be adjusted.

A second element of law is a traditional art of the lawyer's craft; a traditional technique of working out the grounds of deciding particular cases on the basis of received legal materials; a technique of applying legal precepts, and of working out their limits and developing new ones to meet cases to which existing precepts are not adapted, or for which no precepts are at hand. This is the element we have in mind when we say that law is found, not made. The historical jurist has his eye on this element when he defines law as custom. This is the most enduring and most characteristic element in any system of law. It gives continuity to the legal system of Continental Europe from third-century Rome to the present. It gives continuity to the common law from the time of Coke to the present, if not, indeed, from the Middle Ages. It makes English and American and Canadian and Australian lawyers conscious of living under one system, despite diversities in social, political, economic and geographical conditions, and despite growing diversities in the legal precepts with which each is familiar. As compared with legal precepts, this is a universal element. It is his possession of this technique that makes it possible for the lawyer to effect results with what otherwise would be a bewildering mass of legal precepts. It is his ignorance of this technique, and his lack of appreciation of its role as an element in law, that as a rule makes the work of the lay law reformer so futile in action.

But our theory of law ignores this element, and it is not unnatural that its proper and inevitable operations are branded by the layman as judicial usurpation, or as technical quibbles of the lawyer.

Third, and no less important as an element of law, is a body of received ideals of the legal and social order; a body of traditional ideals as to the end of law and what legal precepts and legal institutions should be in view thereof. This is the element we have in mind when we speak of law as universal and rooted in the eternal verities. The philosophical jurist has this element in mind; and so he, too, tells us that law cannot be made, it can only be found. With his eye exclusively on this element, he thinks of legislation, not as creative, but as a mere formulating process. The reality of the law, as he sees it, is in this ideal element. Legislator and jurist and judge can do no more than give definite formulation to details drawn from this ideal picture of the whole. But this view of the third element as the whole is quite as mistaken as the analytical dogma that takes the first element for the whole, or the historical theory that makes the second element the whole. To understand law, to administer justice according to law, above all to make law, we must understand and take account of all three.

Legal precepts, the first element, are relatively transient. When I looked recently at the note books which I kept as a student at law school thirty-six years ago, this was brought home more forcibly. Then imputed negligence was still full of life. Then courts were still trying to put the law as to negligence into chapter and verse of detailed rule as to what was and what was not negligence *per se*. Then it could be said with dogmatic assurance that, save for a few aberrant jurisdictions, the motive with which one exercised his *jus abutendi* was quite irrelevant. Then the arbitrary doctrine of mutuality of remedy flourished in equity. Consider how recently the precepts and doctrines of the law of public utilities have superseded a pedantic law of bailments. Consider that as late as 1870 eminent lawyers were not sure that there was a law of torts. Consider how new is the "right of privacy." Consider what the advent of motor vehicles has been doing to the precepts of our law of agency. Now go back to the report of 1825 and see what a century has done to the details of the old law of property, the details of the old common-law practice, and the statutes of the beginning of our polity which are the staple of the decisions of that time. Then compare the legislation of England, whereby the realty of a deceased passes to the executor, with that of Oklahoma, whereby the personalty passes to the heir, and remember that each jurisdiction claims with good reason to live under the common law. The details of legal precepts, when looked at in the light of such phenomena, seem to be the least part of the law. No matter whether we frame them abstractly and universally, or on the other hand, adapt them minutely to the requirements of time and place, we must expect them to be shaped by the traditional technique to the requirements of the received ideals; and at best their life will be relatively short.

Lawyers rely upon the first element, legal precepts, to insure the stability of the legal order. Rigid precepts, precisely defined, and formal legal transactions, are the means by which, in the past, we have sought to exclude the personal element in the administration of justice, and so to maintain the security of acquisitions and security of transactions which are at the bottom of the economic structure. But the stability attained solely by such legal precepts is illusory. Interpretation, application, analogical extension and restriction, and the other devices by which the traditional technique shapes them to the received ideals for the purposes of concrete cases, can leave the form of words unchanged while working profound changes in their operation and effect. The real guarantee of stability is not in the precept element, but in the traditional technique. It is to be found in professional habits of mind that lead courts to decide cases on the basis of known materials with a known technique, and thus put ascertainable limits to the process of molding precepts to the requirements of ideals. But it is just because this element is par excellence the conservative element in the law that we cannot ignore it in the legal science of a period of growth such as that upon which we are now entering. Not the least of the questions which American jurists must begin to study is the adaptability and adaptation of this technique to the administrative justice demanded by the urban industrial society of today.

Received ideals are both a stabilizing element and an element of growth. In the maturity of our law in the nineteenth century, the ideal of a body of logically interdependent legal precepts logically deduced from a small body of universal legal principles, discoverable through comparative analysis of the comomn law and the modern Roman law, was a force for organizing and

systematizing the legal material which had sprung up in the preceding era of growth. In the formative period of American law, from the Revolution to the Civil War, the ideal of a body of precepts applicable to the social, political, economic and geographical conditions of the new world and the ideal of free political institutions or a free government, and of legal institutions and precepts adapted thereto, gave direction to the reception of English law as the common law of America and enabled us to make out of the materials of the English feudal land law, and English procedure, a body of legal materials by which justice could be administered in a wholly different society and under wholly different conditions. In the seventeenth and eighteenth centuries, the idea of a body of legal precepts coincident with the precepts of morals, and binding because of their intrinsic moral force and their appeal to the conscience, was a liberalizing agency of the first magnitude and made it possible for the medieval English law to become the basis of a law of the world. This third element of law changes slowly. That it does change is seen readily when we compare the received ideals of the age of Coke, when lawyers still thought in terms of the relationally organized society of the Middle Ages, with the received ideals of yesterday, influenced profoundly by the classical economics, by the political ideas of the French Revolution, and by the identification of the immemorial common-law rights of Englishmen, as declared by Coke and Blackstone, with the natural rights of man. The controlling part which these received ideals play in judicial decision is made manifest, to give but one example, in every case in which courts are called on to apply to social legislation the constitutional guarantee of due process of law. That some change may be taking place is at least suggested by the common phenomenon of five-to-four decisions in the Supreme Court of the United States.

Because this element is potentially an element of growth, it may easily be a factor in impairing stability, as it obviously was in the stage of infusion of morals into law in the rise of the court of chancery in England. A feeling that a moral principle, simply as such and for that reason, is a legal rule, while a powerful instrument of liberalization and of growth, may also operate powerfully to unsettle the administration of justice. Hence philosophy of law, which subjects this element in law to critical scrutiny, seeks to give it definiteness of outline, and makes jurists, judges and practitioners conscious of what they are doing when they resort to it, has always flourished in eras of legal growth. It cannot be insisted upon too strongly that philosophical jurisprudence, so far from unsettling the administration of justice, as things are today, must be our reliance for removing an unsettling factor, or at least for minimizing its effects. The unconscious operation of the personal, naïve, social, political and ethical philosophy of the judge has become a conspicuous feature of the administration of justice. In rural pioneer agricultural America of the last century this philosophy was in substance the same for judges and lawyers throughout the land. Occasionally political ideals of states' rights operated south of Mason and Dixon's line; and certain ideals of an industrial society began to appear in New England and in Pennsylvania. Today conflict between the ideals of a rural pioneer agricultural society, which prevailed when our law was formative, and the ideals of an urban industrial society, may be seen beneath the surface in every volume of the reports. No amount of legislation, no amount of rigid legal precepts, will meet this situation. We must recognize that we have to do with an element in law that is of no less importance than legal precepts, and demands scientific study no less than they.

Lawyers must learn what we have had to learn in every other practical field of human endeavor, namely, that pure science has the highest practical importance. Pure physics and pure mathematics in engineering, pure chemistry in technical manufacture, pure biology in medicine, pure botany in agriculture and horticulture, pure economics in business administration, and pure psychology in more than one of these, have demonstrated again and again that what seem at first to be purely scientific investigations, devoid of all practical import, may yield practical results of the highest consequence. Nothing seems more empty that the discussions as to the nature of law which were the staple of analytical jurisprudence in the last generation. Yet I even venture to think that a sound scientific theory of the nature of law, and consequent appreciation of the several elements that make up a body of law, will achieve for our constitutional law what can never be achieved by crude schemes for recall of judges, or recall of judicial decisions, or requirements of specified majorities of the tribunal, or any other device whereby questions of constitutionality are differentiated from everyday questions as to the law applicable to the case in hand. Nothing seems more academic than the attempt to construct a comparative anatomy of the law of Cloudcuckootown on the basis of analysis of English law and the modern Roman law, which has gone by the name of analytical jurisprudence. Yet its influence can be traced through our textbooks both as an influence for good and as one for ill, in the attempt to force our common-law materials into supposed universal categories drawn from the Roman law, which went on through the greatest part of the last century. Even the metaphysical jurisprudence that prevailed on the Continent in the nineteenth century, at which Anglo-American jurists gibed if they deigned to notice it at all, may be shown to have had important practical effects on the administration of justice in the United States through influence on the historical school, and thus upon English and American law books upon which courts and lawyers have relied.

If the abstract legal science of yesterday could do these things for the law of the last century, how much more may we expect the functional legal science of today to do great things for the growing law of the urban industrial society of the present. Note the problems of American law as they confront every thinking lawyer, and the relation to each of them of a legal science which asks what the law seeks to do and how far it succeeds; which asks as to each precept and each doctrine and each institution what its part is or may be in attaining the end of the law and how far it plays that part well or ill; which asks as to each precept and doctrine and conception how far we achieve justice by means thereof and how far we may use it more effectively; which tries all materials and all methods by the test of the results to which they lead, in the endeavor to make social engineering through the legal order as perfect as may be in the time and place.

First among the problems of the day, by general consent, is the administration of criminal justice. To make the substantive criminal law, criminal procedure, organization of the prosecuting machinery, organization and administrative methods of the tribunals, and organization and administration of penal treatment, all

of them fashioned for rural America of one hundred years ago, effective for their purpose in urban industrial America is a huge task. Just now everyone, unless it be the lawyer, has an infallible remedy. The enduring remedy must come through lawyers, and will be one that lawyers must administer. The layman can but treat the symptoms. The things that operate behind the symptoms are too deepseated for him. But the lawyer can do little until long-continued, thorough, scientific research has given a basis on which to work.

Next only to criminal law is the problem of legislation. It is easy to decry legislative lawmaking. It is easy to declaim against the "rain of law." But legislative lawmaking is obviously the type of lawmaking of the maturity of law. If we are inclined to scoff at it, we must remember that legislation solved the problem of workmen's compensation when judicial efforts failed, and that the exigencies of modern business preclude waiting for a slow process of judicial exclusion and inclusion to work out legal conceptions for many a settled practice of manufacturing and marketing. Just as the high-powered motor vehicles of today require us to mark out the middle of the road on the pavement, and to mark out zones of safety and street crossings and turns, so the high pressure operations of modern business require lines to be laid out and limits to be defined and permissible courses of conduct to be indicated in advance by legislation rather than after the event by judicial determination of controversies. Legislation is something we must have; and yet admittedly it is most unsatisfactory in practice. How to make it take account of the legal background on which the courts will project it when they come to apply it, how to insure that all the interests have been, as it were, inventoried and valued and delimited so as to secure the most that may be with the least friction and the least waste, is a problem of social engineering calling for as great an equipment of science and as much creative resource as any problem of electrical or mechanical engineering that has been solved in whole or in part through the research carried on in our highly endowed laboratories.

Hardly less important is the problem of enforcing legal precepts. This problem has become acute in the United States because of recent legislation that tries our enforcing machinery at every point. But it antedates that legislation and is a serious one wherever a complex social and economic order requires legal precepts beyond those simple rules and standards, sufficient for the rural agricultural society of the past, the propriety whereof was apparent to every thinking man. The legal science of the past knew of no such problem. To the analytical jurist the whole matter was one of executive efficiency. For the lawyer it was enough that a precept had obtained the guinea stamp of establishment by the sovereign. The lawyer had nothing to do with enforcement. That was for the executive. If the executive did not make the precept effective in action, why then the executive was at fault. To the historical jurist, the whole matter was one of whether the precept did or did not correctly express human experience. If it was a mere formulation of what had been discovered by experience, enforcement would take care of itself. It would be rooted in habits and customs of mankind and would be secure on that basis. If not, it was a futile attempt to do what could not be done, and all the attempts at enforcement would, in the end, prove vain. To the philosophical jurist, the whole matter was one of the intrinsic justice of the precept, of its appeal to the conscience of the individual citizen. If as an abstract proposition it was inherently just, its appeal to the conscience of the individual would secure obedience from all but an almost negligible minority who persisted in going contrary to their consciences, and might have to be coerced. If not, the attempt to enforce an unjust rule contrary to the conscience of the individual citizen ought to fail, and we need not feel badly if it did fail.

Such simple theories of enforcement fall to the ground under the conditions of the urban society of today. We learn quickly that efficient or inefficient executives alike encounter certain obstacles that seem beyond the reach of efficiency. We soon find that in such matters as traffic regulation the general security requires us to make habits instead of waiting for them to develop by experience at the cost of life and limb. We come to see that the exigencies of the general security and of the individual life require us to prescribe many things the reasons whereof are not upon the surface and the justice whereof, clear as it may be to the expert, will not appear at once to every reasonable and conscientious citizen. Hence we have to deal with the subject of enforcement in new ways. We have to study the limits of effective legal action. We have to determine what we may expect to do through law and what we must leave to other agencies of social control. We have to examine our array of legal weapons, appraise the value of each for the tasks of today, and ask what new ones may be devised and what we may expect reasonably to accomplish by them when devised. Here, too, is an unexplored domain or the legal science of tomorrow.

Another problem of prime importance is preventive justice. Civil-law countries have gone much further than common-law countries in this matter, and England has gone somewhat further than we have. In too many American jurisdictions the only way to find out what a contract means is to break it. The appointed way to determine whether your neighbor has an easement over your land is to assault him when he tries to exercise it. The appointed way of learning whether a penal statute is or is not the law of the land is to break it and run the risk of going to jail if it turns out to be constitutional. In all our jurisdictions we try, a generation after the event, the testamentary capacity and free action of a long-lived testator who steadfastly adheres to the dispositions of his will as first made. For the conduct of business and the conduct of enterprises we have come to rely upon administrative boards and commissions, which have been set up on every hand to guide us at the crisis of action; much as the traffic officer at the street corner tells us when to cross the street and when to stand patiently by and watch the procession of motor vehicles roll by. For criminal law, juvenile courts have made a notable beginning. Yet it is not too much to say that preventive justice is another unexplored domain in which the legal investigator of the future may hit upon epoch-making discoveries.

Still another field for research is judicial organization and administration. For we may not flatter ourselves that the standard American adaptation of the English judicial organization and administration of the eighteenth century is something that will stand forever. It was an ingenious adaptation to the society of the time. It is already an anachronism in the huge urban community of today.

Finally there is the problem of individualizing the application of justice in that part of its administration

in which it has from the nature of things to deal with unique situations. There is nothing unique about a given promissory note, or a given estate in land, or a given conveyance. Promissory notes may be printed in blank and it remains only to fill in dates, amounts and signatures. Conveyances may be made upon blanks in the same way. But there is no such thing as a blank automobile accident or a blank railway accident or a blank outline of reasonable conduct of a public utility. In the past we have tried at one time to deal with all cases after the manner of promissory notes or conveyances of estates, and at another, by way of reaction, to treat all cases as if they were cases of human conduct. It is not the least problem of modern law to find out how to apportion the field between rule and standard, between logic and discretion, between treatment of cases in gross and individualized treatment of unique cases or unique elements in cases, so as most completely to achieve the ends of the legal order.

Such are some of the major tasks that confront the American lawyer of today. If they had to be performed by the courts unaided or by the practicing lawyers unaided, I might despair of any results in such time as it is reasonable for us to call upon the laity to wait. It might be a lesser evil to turn things over to the business man and the worker for an offhand application of their common sense. The dockets of courts are too heavy, the view of these problems which any court may get is too fragmentary, and its experience is too specialized or too local to make it possible for courts to do for this time the sort of thing they did so well in the formative era of our legal institutions. Likewise the work of the practitioner of today is too specialized and he is too much engrossed in the management of enterprises and the practical guidance of business to be in a position to contribute more than an occasional ingenious detail to the solution of these problems. Nor do I hope for much, as things are, from the suggestion of a ministry of justice. We are not likely to set up a ministry so free from political pressure, so competently manned, so animated by pure zeal for the advancement of justice and so filled with scientific spirit as to compel the confidence of legislatures and people and insure that its recommendations be worthy of adoption. Even less may we rely upon occasional legislative commissions or upon the intermittent and hurried labors of judiciary committees.

Our best reliance, as I venture to think, must be upon our national law schools. In these institutions we may find the permanence of tenure, the conditions of work—opportunity of dealing with problems as a whole, possibility of surveying a wide field, extending beyond limitations of jurisdictions and parties—the independence of politics and the guarantees of training and scientific attitude, which are essential to effective research and must command public confidence in its results. Were legal research in such institutions endowed, as is every other form of research in American universities, were it possible for legal scholars to take time from teaching to devote themselves to the furtherance of justice according to law by conducting the investigations upon which effective reforms must proceed, we may be confident that the results would be no less far reaching and no less salutary than those which have flowed so abundantly from the lavish endowment of medical research. What research has done for the prevention and cure of disease, what it has done for engineering, and the technical arts, and agriculture, and business administration, it may yet do for the law. In no way may the lawyer be so sure of achieving his task of making straight the paths of American justice as by doing his part to assure to our law schools the means of carrying on the scientific investigations on which the law reforms of the future must go forward.

"THE SAID SMITH, AFORESAID"

Being a Chapter from the Early Experiences in this Country of a European-Trained Lawyer Who Strikes Up a Hostile Friendship With a Hard-Boiled American Practitioner

By Axel Teisen
Of the Philadelphia, Penn., Bar

I HAD brought with me the October issue of the American Bar Association Journal and of the Journal of the American Judicature Society to help while away the time on an Ocean trip under Doctor's orders.

I read a little in the morning and a little more in the afternoon, and as the days passed by my mind reverted to the first months of my life in America, to the days of "said Smith, aforesaid." Ac haec meminisse juvabit.

Looked back upon, it appears highly ridiculous.

Here was I, a Danish lawyer dropped down in Los Angeles (then a town of some sixty thousand people) with but the most superficial acquaintance with English-American law, with complete ignorance of what could possibly be meant by the distinction between law and equity, by estates in land, by trying civil cases before a jury and many other features of American law, with an imperfect knowledge of English and entirely unprepared for Western ways and manners as they were then.

On the other hand was Smith, of American stock for generations, who claimed that he could cite every case decided by the Supreme Court of California (and many others) by title, volume and page, "learned" in the law to an extraordinary degree, still with a very limited education, and to me appearing amazingly ignorant of anything not di-

rectly connected with American law and the daily routine of life.

We became fast friends. I teased him, laughed at him until I nearly burst and called him "said Smith, aforesaid," at which he swore at me as only the sons of the Golden West could swear in those days and called me a "conceited ignorant foreigner" besides other pet names, more or less to the same effect.

When I left Los Angeles for San Francisco, he was the only person who got up very early in the morning to see me to my train, and there were tears in his eyes when he wished me good-bye and asked God to bless me.

He was a splendid fellow, straight as a die, with a heart of gold and loyal to the last ditch.

For years we kept up a correspondence, but after a while we lost sight of each other, and now he has been dead for a number of years.

Of course, his name was not Smith, but in calling him by that name nobody will have any call to feel either offended or flattered.

A few days after my arrival in Los Angeles I found myself installed in the law office of a firm of three lawyers of three different nationalities, none of them Americans, although I believe the jury case trier among them had been brought up in California.

It was a most international office building, our floor in particular; there was the Belgian Vice-Council, two Germans representing German firms, and some others whom I do not remember. At one end of the corridor Smith had his office, and I really believe he was the only American on the floor, except, perhaps, for some desk room renters.

My work in the office consisted simply in copying papers, serving subpoenas (at which job I had many amusing experiences due to my persistent mispronounciation of names) and when there was nothing else to do, I read the California Codes until I fell asleep.

Between 1 and 2, I took English speaking lessons from a young lady, who tried very hard to convert me to Methodism, of any knowledge of the doctrine, meaning and purpose of which I was entirely innocent.

The very first day I spent in the office it must have been noised about that a new wild animal had entered the garden. I believe everyone in the building came in to look me over and wish me good luck; but after they had found out that I neither played poker, nor had any particular desire to stand drinks, my place knew them no more.

But Smith, he stuck.

Almost every day when I came back from my Methodist missionary, there was Smith either waiting for me, or coming in a few minutes later. "Come back to my office," he would say. "I have something I wish to show you." Generally this was but an excuse; what he wanted, was to have me to lecture to and argue with. I had never seen such a law office before; it looked exactly as if there had been an execution and nothing had been left except those things protected by the exemption law: an old rolled-top desk with a desk chair, three kitchen chairs, a sort of document table with one leg so short that if one leaned against the table, everything on it would rush to the floor, and then—law books galore. Still, Smith had the reputation of being very well off and of collecting very substantial fees.

Originally, Smith's interest in me was partly philanthropic and partly selfish. I was to him more of a specimen than a person. I needed all his help to be made a good American (under his wings did I take out my "first papers") and I was a most God-given subject upon which he could practice and satisfy his pedagogic instinct and inclination. He loved to lecture, but I learned very little from his lectures. The trouble was that what he lectured on was mostly some technical point of pleading or of admissibility of evidence, which he had run up against in one or another of his cases; but I was entirely without the information necessary to understand or appreciate his points and besides, I never could extract much interest out of technicalities as such.

The first time we got into a dispute was when Smith read to me what he called a "model complaint" which he had prepared in a case between two Basques, both with names beyond the ability of any "Nordic" to pronounce or even to spell, unless one had them in writing before one's eyes.

There was at the time quite a little colony of Basque sheep farmers and shepherds in the foothills around Los Angeles. Most of them were quite well to do, and all of them litigious to a degree. Smith had quite a clientele among them. He could not understand what they said, and they had great difficulty in understanding him, but lucky there was a young Frenchman from Bayonne or its vicinity in the building, and with him as interpreter they managed to get along.

The statement had the usual caption and then went on to say: "The plaintiff, the said (unpronounceable name) complains of the defendant (another unpronounceable name) and for cause of action avers."

I held my peace.

The statement then went on to set forth the facts complained of, in separate paragraphs, and the final demand for relief. But every time either the words plaintiff or defendant occurred, they were preceded by the words "the said."

I still held my peace.

But when, say in the fourth paragraph, the plaintiff became "the said plaintiff aforesaid," I held up my hand and asked: "Why do you put in all these 'the said' and now 'the said, aforesaid'? There are but one plaintiff and one defendant: you have given their names (and what names!) and there cannot possibly be any doubt about who the plaintiff and the defendant are, unless possibly the 'aforesaid' is to indicate that later on in the complaint another and additional plaintiff will make his appearance. I have been told that English solicitors used to be paid so much per 100 words, and have heard that this custom is the explanation of the verbosity of all English legal papers. Does this rule still hold good among American lawyers?"

That set Smith wild. He could hardly restrain himself so as to allow me to have my say, but when I stopped I certainly did get it.

Of course, I had never seen or heard of such a statement of claims before in my life, and to me it appeared as highly grotesque, while on the other hand Smith had never seen or heard of any other kind of statement, and to him my criticism would

naturally appear as both foolish, impudent and impertinent. Why, how could there be any doubt, that this was the way a complaint ought to be made?

Well, after no end of words we buried the hatchet, for the time being, and from that day on I called Smith "said Smith, aforesaid," and got sworn at worse than before.

Of course, during the years following I learned that "the said" and "aforesaid" are of the stock in trade of every American lawyer, and that he cannot very well get along without them, and I myself have fallen into the habit; unless I watch myself, I am apt to put in all sorts of unnecessary "the said" and "aforesaid."

But let us come back to where we started.

What was it in the two Journals which set me remembering?

First, in the Bar Association Journal, I found a review of William W. Cook's "The Principles of Corporation Law" as an example of "a new type of text book."

In looking over Smith's innumerable law books I found the Commentaries of Blackstone and of Kent, three volumes on evidence (I forget by whom) and nothing else but Reports and Digests thereof. I asked Smith whether there were no general treatises on the principal divisions of the law, arranged in systematic order, setting forth the principles and with references to Court decisions. Yes, said Smith, there were no end of text books; he had a number of them in his house; they were not of much use in the office, where the digests took their place and were much more useful, but occasionally he would read a chapter or two in one of them, when he wished a fuller statement than what he could get out of the reports. He brought in a treatise on contracts in two volumes and allowed me to take it home for study.

In a week's time I brought the books back.

Let me repeat, that Smith and I were perfect greenhorns as to each other's conception of law and its enforcement. We really did not understand each other. In addition, we were both young (in our early thirties) took very little account of each other's susceptibilities and were apt to call every spade by its most expressive name.

When Smith asked me what I thought of the book, I answered him that I did not consider this a treatise on the law of contracts, to which Smith answered, "I have not had the misfortune to know many Danes, but they seem to have the reputation always to 'know better'; and you seem to live up to the reputation. If this book is not a treatise on the law of Contracts, would it be below your omniscient dignity to tell me what it is?" To which I came back: "It is a legal scrap book upon sundry questions connected with contracts; there is no reasonable system in it; it might as well have been arranged alphabetically like your digests and law-dictionaries."

Smith had one of his usual explosions, to which I had become quite accustomed, and after he had quieted down, we came to a more peaceful discussion. I had had some trouble with the name "text book"; in itself it expressed nothing, not any more than the name "paper book" which I later ran across in Pennsylvania, but what Smith was interested in was to know how I would have a text book, handbook, treatise or monograph (call it what you will) arranged and written.

I gave Smith my ideas, but shall not repeat them here. All that I said is covered by Mr. Cook in his preface "a text book stating general principles with a few applications, and with footnote references to elaborate text books and to the decisions of the Supreme Court" and in the reviewer's remark "it is a full statement of the law." I insisted in particular, that such a book must be systematic and proceed in reasonable order; it should not be a research work proceeding from the particular to the general, but on the contrary should set forth first the general principles applicable to all contracts and then the particular principles, limitations and exceptions applying to each separate kind of contract. I complained that the book he had lent me was a hash, where general and specific principles and rules were hopelessly mixed up, and that no subject was fully treated in any one place, but occurred and recurred again and again all through the book, to the great confusion of the reader and of the author himself.

Now this "new kind of text book" appears to have arrived, or at least to have commenced to arrive.

The Judicature Society's Journal contained an article under the heading "Where Jury Trials Fail."

What battles Smith and I fought over the Jury!

I had no practical experience in the matter, but in my country the introduction of the jury in felony cases had been under spirited and violent discussion ever since I was born and for some time before; I was well soaked in all the arguments pro and con, and had reached the conviction that no member of society ought to be branded a criminal unless so declared by the mean low conscience of the society of which he was a member, and that the jury was the best means available and possible for ascertaining what such conscience demanded. So far we agreed, even if on different grounds. I also agreed that all political cases and so called "press cases" ought to be submitted to a jury. But when it came to civil cases, whether of contract or of tort, we disagreed absolutely.

Of course, Smith had a very strong argument in the provisions of the Constitution of the United States adopting the common law of England as the law of the United States and guaranteeing jury trials as heretofore. And for that reason our discussion became more or less academical. It would not do any good to set out in detail our mutual arguments; they have been and are now being set forth so often that everybody is familiar with them. But Smith was so intent on convincing me that I was wrong that he sacrificed several days in taking me around to various departments of the County Superior Court, where we sat out the trials of two contracts and two tort cases.

But before we attended any of these trials, Smith insisted that we should hear a trial of a criminal case. The case in question was against a railroad employe for embezzlement. He evidently had good connections, for he was represented by two leaders of the Bar, one of whom shortly after became U. S. Senator, and the other of whom afterwards was elected Governor of California. South-

ern California was still rather raw. The courtroom was full of spittoons and everybody in the room, from the Judge down, chewed tobacco and spat. I did not understand very much of the proceedings which to me appeared mostly to consist of "I object"—"Objection sustained"—"Objection overruled"—"Exception noted," and in which mighty little evidence was allowed to go in.

The defendant was acquitted.

But what did interest me, were the speeches.

The prosecuting attorney hardly touched upon the facts of the case at all, but at great length held forth about the necessity of protecting society and property, especially in a new and hardly settled country. Senior counsel for the defense made a short speech to the point, while his Junior did not make any legal argument at all, but with tears in his voice and in what he evidently considered an excellently dramatic manner implored the jury to consider the young man's parents and his own future career.

I had the feeling that it was he who won the case.

I expressed my wonder to Smith, who evidently had not been favorably impressed either, since he called all the attorneys involved, blatherskites, full of gab and insisted that the judge had been asleep during most of the proceedings; but in this he was wrong. I had seen and been fascinated by the Judge's jaws moving all the time.

We had had enough for one day. But most of next week we spent in the civil departments of the Court, where we heard the four cases I mentioned above.

Smith's object had been to show me what an excellent thing jury trials were in civil cases, but he had not been lucky in selecting his cases, or else the juries were exceptionally bad. After it was all over, he had to agree with me that in both of the trespass cases and in one of the contract cases the verdicts ought to have been the other way. In the fourth case the presentation by both sides had been so poor that it would have stumped anybody to say what the verdict ought to have been.

For at least a week thereafter Smith and I had long arguments and debates about the value of jury trials in general, in civil cases in particular, and more particularly in trespass cases, and about the value and correctness of the "rules of evidence." Especially the last question led to endless debates.

Of course, neither of us convinced the other.

But during these weeks of constant debating, of the eating of a number of lunches and suppers together, our mutual relations had changed a great deal. To me, Smith had ceased to be a curious and amusing survival of the 17th century, while to him, I had ceased to be a somewhat interesting, but otherwise damned ignorant foreigner.

Little by little, we had become not only fast personal friends, but we had commenced to understand and appreciate each other's viewpoints, and their foundations. He ceased to swear at me and to call me names; I ceased to laugh at him, to tease him and to call him "said Smith, aforesaid."

Thereafter, we did not cease our discussions, but he ceased to try to force his doctrines down my throat as so many absolute dogmas; I stopped to rant at his "medieval" conceptions of law. We mutually set forth our ideas and opinions and discussed and compared them in all tranquility. It may be said that we constituted ourselves a sort of private Comparative Law Bureau.

Whether Smith gained anything in particular by all this, I cannot say, but if personally I gained nothing else I certainly did gain quite a familiarity with and understanding of American legal terms, expressions and phrases which I could not have obtained so quickly and so easily in any other way.

But we had one mutual and sure gain. Both of us learned to understand in a way neither of us did before the essential identity of substantive law in all modern countries, and that all remedial law aimed at the same object, and that the differences in ways of enforcement were depending more on differences in time, history, place and temperament than on any philosophy of what would and should be the only or the best way.

We never touched upon municipal or criminal law, but as to the rest I think that at one time or another we debated upon all the major and a good many minor questions.

Conciliation, Small Claim Courts, Arbitration, Preliminary Hearings, a proper Real Estate system and Recording of Transfers (into all of which I, my father and my grandfathers had been born) and almost every other topic of both substantive and adjective law which now fill the law journals were discussed by Smith and myself thirty-five years ago, very inadequately and very superficially, it is true; still, they were discussed at a time when most of our lawyers did not have even a suspicion that such questions existed and would have to be solved.

Philadelphia, December 12, 1925.

Citizenship With Reservations

A member of the Association sends us a curiosity in the form of the following declaration of intention to become an American citizen which was actually filed in the U. S. District Court at El Paso, Tex., on Jan. 14, 1926:

Declaration of Intention to be an American Citizen and to remain so for my natural life, provided:

1. That I am granted useful employment by the People of America to enable me to support myself, my wife and my children in a seemly, respectable and decent manner, to occupy and hold buildings and property for said purpose and to afford others to do likewise—all in accordance with my knowledge, experience and ability.

2. That I am extended protection by the Government of America for me and mine in matters of family and marriage.

If so accepted and accommodated, I confirm that I confine my loyalty and support (as I have sincerely endeavored to do during the last twenty-five years) to the Sister-Republics of the United States and Mexico (parts of North America) during my said natural life.

This is my spiritual, moral, mental and physical intention to which I shall try to adhere in as far as that is possible for me to do.

Signed, ————.

At El Paso, Texas,
January 14, 1926.

LINCOLN ON THE CIRCUIT

Riding the Circuit a Picturesque but Arduous Practice—Lincoln a Droll Figure—Song and Story in the Evenings After Court Adjourned—A Notable Group of Illinois Lawyers—A Mock Trial—How Lincoln "Got Even"—When He Was Most Formidable as an Antagonist—Anecdotes and Reminiscences.

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RIDING the circuit was an arduous though picturesque practice of the early Illinois bench and bar. In the forties, the State was divided into nine judicial districts, each presided over by a judge who traveled on horseback from one county seat to another with a cavalcade of lawyers at his heels.

The Eighth Judicial Circuit was composed of fourteen counties, stretching from Sangamon on the west, a distance of one hundred and twenty miles, to Vermillion on the east at the Indiana line. The country was sparsely settled and in winter the mud was deep, the rivers and creeks swollen and treacherous. But it was a merry and carefree company that forded these streams and galloped across the wide, rolling prairies in fair weather and foul.

Some members of the bar visited only a few of the most accessible county seats in the district, while others made nearly all of them. Only two men, however, Judge David Davis and Abraham Lincoln, a tall, angular lawyer from Springfield, rode the entire circuit—Davis because he had to, Lincoln because he loved it.

Always scrupulously clean and close shaven, but clad in an ill-fitting suit, the coat sleeves and trousers several inches too short, his tall, battered "stove-pipe" hat looking "as if a calf had gone over it with its wet tongue," carrying an old saddle bag filled with books, papers and change of linen, and a huge, faded, green cotton umbrella tied with a piece of twine to keep it from falling open, the knob gone from the handle, with "A. Lincoln" in large white muslin letters sewed inside, Lincoln was the drollest figure and the best liked man in all the fourteen counties. Yet with all his popularity as he jogged along on horseback or, later, drove his "pokey" horse to a rattling buggy, he would have been greatly surprised could he have known that today, on all the roads of the old district, granite slabs would mark the way he went with bronze tablets that read:

Abraham Lincoln
traveled this way, as he
Rode the Circuit
of the
Old Eighth Judicial District
1847 1859

The intimacy between David Davis, the presiding judge, a Yale graduate, stern and dignified on the bench, and Abraham Lincoln is graphically illustrated by Leonard Swett, one of Lincoln's closest friends, whose description of his first introduction to Lincoln has only recently come to light.

"I shall never forget," says Mr. Swett, "the first time I saw Mr. Lincoln. I had expected to encounter him at Springfield, but he was absent from home, nor did our meeting occur till later. It was at the town of Danville. When I called at the hotel it was after dark and I was told that he was upstairs in Judge Davis' room. In the region where I had been brought up, the judge of the court was usually a man of more or less gravity so that he could not be approached save with some degree of deference. I was not a little abashed, therefore, after I had climbed the unbannistered stairway, to find myself so near the presence and dignity of Judge Davis, in whose room I was told I would find Mr. Lincoln. In response to my timid knock, two voices responded almost simultaneously, 'Come in.'

"Imagine my surprise, when the door opened, to find two men undressed, or rather dressed for bed, engaged in a lively battle with pillows, tossing them at each other's heads. One, a low, heavy-set man who leaned against the foot of the bed and puffed like a lizard, answered to the description of Judge Davis. The other was a man of tremendous stature; compared to Davis he looked as if he were eight feet tall. He was encased in a long, indescribable garment, yellow as saffron, which reached to his heels and from beneath which protruded two of the largest feet I had up to that time been in the habit of seeing. This immense shirt, for shirt it must have been, looked as if it had been literally carved out of the original bolt of flannel of which it was made and the pieces joined together without reference to measurement or capacity. The only thing that kept it from slipping off the tall and angular frame it covered was a single button at the throat; and I confess to a succession of shudders when I thought of what might happen should that button by any mischance lose its hold. I cannot describe my sensation as this apparition, with the modest announcement, 'My name is Lincoln,' strode across the room to shake my trembling hand."

Hotel accommodations on the circuit were usually of the worst sort. The food was bad, the bedrooms small and often anything but clean, and so crowded during court week that four or five lawyers frequently slept in the same room, while defendants on trial, witnesses, lawyers, jurors and judge all ate at one long table in the dining room. But Lincoln was never heard to complain of either food or lodging. All his life he seemed wholly indifferent to the creature comforts that meant so

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much to his associates. Once, after he had become the best known lawyer in Illinois, when the landlady explained that the coffee was cold because she had no wood with which to replenish the fire, Lincoln threw off his coat, seized an axe, hurried to the woodpile and soon the box in the kitchen was overflowing with fuel.

However, in spite of hardships and discomforts, the circuit had its compensating joys. In the evenings, after court had adjourned, in Judge Davis' room gathered perhaps the most remarkable group that the American bar has ever known. There was David Davis, the dignified judge while on the bench, but off of it the affable companion who loved a laugh. There was Logan, the scholarly; Stuart, the shrewd and kindly; Swett, the clever; Browning, the handsome; Lamon, the amusing; Yates, the eloquent; and Ficklin and Baker and Usher and McClernand and Palmer and Trumbull and Oglesby, and always the droll, genial favorite of them all—Lincoln. Hour after hour would swiftly pass with song and story, and Judge Davis' fat sides would shake with laughter as Lincoln related some humorous incident in his inimitable way.

Then, after midnight, when the merry crowd had dispersed and gone to sleep, Lincoln, with a candle at the head of the bed, his long legs protruding over the foot, would read Shakespeare or Burns or a law book until far into the hours of the morning, apparently unmindful of the lusty snoring of Judge Davis and other roommates.

Occasionally, Lincoln would rise earlier than the rest, dress, put fresh wood on the fire, and sit there gazing into the flames, his hands thrust deep into his pockets, lost in one of his fits of gloom. His companions never disturbed him at such a time, as they had seen it before and knew that after awhile he would shake it off. Later, perhaps at breakfast, somebody would crack a joke or refer to some amusing incident of the night before and then Lincoln would begin to emerge from the shadows. The lines of care in the rugged face would grow fainter; the gray eyes, dull and expressionless in those periods of dejection, would flash and twinkle, and Lincoln was himself again.

When in Decatur, Illinois, recently, the writer obtained a copy of the "Personal Recollections of Jane Martin Johns," which relates an interesting Lincoln incident of the old circuit-riding days. In 1849, Mrs. Johns was living at the Macon House, noted as the best hotel in central Illinois. One day her piano arrived, after a long journey by wagon, but there was nobody at the hotel to help unload the heavy instrument. About this time court adjourned just across the public square and in a few moments the judges and lawyers crowded about the wagon. "A tall gentleman stepped forward," says Mrs. Johns, "and throwing off a big gray Scotch shawl, exclaimed, 'Come on, Swett, you are the next biggest man.' That was my first meeting with Abraham Lincoln." She then relates that with the help of Lincoln and his associates, the piano was unloaded and set up in the parlor and that, after supper, she gave a little concert which was attended by Judge Davis and the entire bar. Many songs were sung, the lawyers joining in the chorus, and Swett and Browning sang "Rocked in the Cradle of the Deep," "Bonaparte's Grave," and "Kathleen Mavourneen." She continues: "I sang 'He Doeth All Things Well,' after which Mr. Lincoln, in a very grave voice, thanked me for the evening's entertainment and said: 'Don't let us spoil that song by any other music tonight.' Many times afterward I sang that song for Mr. Lincoln and for Governor Oglesby, with whom it was also a favorite."

Lincoln's First Portrait, Aged 37. Taken when he began riding the circuit.

The lawyers on the circuit had what was called "Orgmathorical Court," a mock tribunal, which held night sessions at the court house, where various members of the bar, with much pretended gravity and to the huge enjoyment of the whole countryside, were tried for sundry "high crimes and misdemeanors."

Ward H. Lamon, Lincoln's local associate at Danville, relates an occasion when the senior partner was tried by this "court." A man named Scott was guardian of his feeble-minded sister, who had an estate of about ten thousand dollars, mostly cash. A designing adventurer was attempting to marry her and had filed a motion in the Vermillion Circuit Court to oust the present guardian. Scott employed Lamon's firm to protect the estate of his unfortunate ward and to resist the motion, for an agreed fee of $250. When the case was called for hearing, the preparation had been so thorough that Lincoln's argument won the decision of the court in less than an hour. Lamon says: "Our success was complete. Scott was satisfied and cheerfully paid over the money to me inside the bar, Mr. Lincoln looking on. Scott then went out and Mr. Lincoln asked him, 'What did you charge that man?' I told him $250. Said he, 'Lamon, that

is all wrong. The service was not worth that sum. Give him back at least half of it.'

"I protested that the fee was fixed in advance, that Scott was perfectly satisfied and had so expressed himself. 'That may be,' retorted Mr. Lincoln with a look of distress and of undisguised displeasure, 'but I am not satisfied. This is positively wrong. Go call him back and return half of the money at least, or I will not receive one cent for my share.' I did go and Scott was astonished when I handed him back half the fee.

"This conversation had attracted the attention of the lawyers and the court. Judge John Davis, then on our circuit bench, called Mr. Lincoln to him. The judge never could whisper, but in this instance he probably did his best. At all events, in attempting to whisper to Mr. Lincoln, he trumpeted his rebuke in about these words and in rasping tones that could be heard all over the court room: 'Lincoln, I have been watching you and Lamon. You are impoverishing this bar by your picayune charges of fees, and the lawyers have reason to complain of you. You are now almost as poor as Lazarus, and if you don't make people pay you more for your services you will die as poor as Job's turkey!'

"Judge O. L. Davis, the leading lawyer in that part of the State, promptly applauded this malediction from the bench; but Mr. Lincoln was immovable. 'That money,' said he, 'comes out of the pocket of a poor demented girl, and I would rather starve than swindle her in this manner.' That evening the lawyers got together and tried Mr. Lincoln before the 'Orgamathorical court.' He was found guilty and fined for his awful crime against the pockets of his brethren of the bar. The fine he paid with great good humor and then kept the crowd of lawyers in uproarious laughter until after midnight."

A few days after this trial, Lincoln more than evened the score with the "Orgamathorical court." As related by one who was present, "It had rained for days and when the troop of circuit riders came to a swollen stream, apparently a mile wide, Lincoln was the only one who knew the country well enough to act as guide. He saw his opportunity and agreed to conduct the party across if they would do exactly as he bade them. It was the boys' game of 'follow my leader.' The pledge was given and every lawyer had to strip, tie his clothes in a bundle, mount his horse, and follow on. This grotesque, naked company, including the cherubic figure of David Davis and the giant form of Abraham Lincoln, wound its way up and down the stream on horseback until, much as Moses led the hosts of Israel through the Dead Sea without wetting a garment, Lincoln conducted them to dry ground on the farther side of what they supposed was a flood, but which at no time rose higher than a horse's knees. One can imagine Lincoln's laugh at the threats of revenge which his associates uttered when they found what an absurd picture they had presented."

Lincoln's attitude toward fees is further indicated by his letter to a client whom he had represented in an important transaction involving valuable hotel property in Quincy. When the deal was over, nothing have been said as to the amount of compensation, the client mailed his attorney a check for $25. In a few days he received the following letter:

February 21, 1856.

Mr. George P. Floyd,
Quincy, Illinois.

Dear Sir:

I have just received yours of 16th, with check on Flagg & Savage for twenty-five dollars. You must think I am a high-priced man. You are too liberal with your money.

Fifteen dollars is enough for the job. I send you a receipt for fifteen dollars, and return to you a ten-dollar bill.

Yours truly,

A. Lincoln.

It is little wonder, therefore, that Lincoln wrote to his friend, Joshua Speed: "I do not think I can come to Kentucky this season. I am so poor and make so little headway in the world, that I drop back in a month of idleness as much as I gain in a year's sowing."

He always discouraged litigation and time and again refused employment where law and justice did not equally appear. Herndon came into the office one day and heard his partner giving the following advice to one who sought his services:

"Yes, we could doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children, and thereby get for you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me as much to the woman and her children as it does to you. You must remember, however, that some things legally right are not morally right. We shall not take your case, but we will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man. We would advise you to try your hand at making six hundred dollars in some other way."

On another occasion, Lincoln was very anxious to obtain a continuance in a certain action and the resourceful Herndon prepared a dilatory plea that was certain to postpone the case. "Is this founded in fact?" Lincoln demanded when the paper was submitted to him, and the junior partner reluctantly admitted that all the allegations were not strictly accurate, urging, however in justification, the exigency of the case and the peril of their client. But Lincoln repudiated it without a moment's hesitation. "You know it is a sham," he said, "and a sham is very often but another name for a lie. Don't let it go on record. The cursed thing may come staring us in the face long after this suit has been forgotten." Of course, the document was not filed.

Lincoln was regarded as a really formidable antagonist only when he was thoroughly convinced of the justice of his cause. He seemed utterly incapable of that professional partisanship that enlisted the best efforts of his colleagues at the bar, regardless of the side they were on. He would never argue a case before a jury when he believed he was wrong. His associate, Henry C. Whitney, says of him in this respect: "No man was stronger than he when on the right side, and no man weaker when on the opposite. A knowledge of this fact gave him additional strength before a court or a jury."

Leonard Swett and Lincoln were once defending a man charged with murder, and, after all the evidence was in, Lincoln believed their man was

guilty. "You speak to the jury," he said to Swett, "if I say a word they will see from my face that the man is guilty and convict him."

In another murder case, the circumstantial evidence of guilty seemed almost conclusive and, when Lincoln, who had never wavered in his masterly defense, arose to address the jury, he frankly conceded that the testimony for the State was exceedingly strong. He said, in his slow drawling way, that he had thought a great deal about the case and that the guilt of his client seemed probable. "But I am not sure," he said as his honest gray eyes looked the jury squarely in the face, "are you?" It was an application of the rule of reasonable doubt which secured an acquittal.

Lincoln had an unfailing good humor and never indulged in personalities, then quite common in trials of that day, unless in self-defense. However, he was known to possess a withering sarcasm which though rarely employed never failed to drive an opponent to cover. During the selection of a jury in a certain case, a lawyer challenged a juror because of his acquaintance with Lincoln, who represented the other side. Such an objection was then considered a personal reflection and Judge Davis promptly overruled the challenge. When Lincoln's turn came to examine the panel, he also began to inquire whether any of them knew opposing counsel. Two or three had said that they did, when the Court interposed:

"Now, Mr. Lincoln," he observed severely, "you are wasting time. The mere fact that a juror knows your opponent does not disqualify him."

"No, your Honor," responded Lincoln dryly, "but I am afraid some of the gentlemen may not know him, which would place me at a disadvantage."

It was as the champion of the oppressed that Lincoln was a most resourceful and dangerous adversary. Injustice in any form aroused him intensely. In the Wright case, he represented the widow of a Revolutionary soldier who, after many weary years, had obtained a comfortable sum from the government in back pensions, only to have half of it appropriated by an unscrupulous agent who had rendered little, if any, service. Lincoln brought suit to recover the sum thus converted and the notes of his speech to the jury are still in existence. They read: "No contract—Not professional services—Unreasonable charge—Money retained by defendant—Not given by plaintiff—Revolutionary War—Describe Valley Forge—Privations—Ice—Soldiers' bleeding feet—Plaintiff's husband—Soldier leaving home for army—*Skin defendant*—Close." Eye witnesses have left on record ample testimony that these notes were fully and effectively expanded when Lincoln came to make his final argument and that the defendant was duly "skinned" to the entire satisfaction of the jury and the spectators.

"No lawyer on the circuit was more unassuming than was Mr. Lincoln," says one who practiced with him. "He arrogated to himself no superiority over anyone—not even the most obscure member of the bar. He was remarkably gentle with young lawyers who were just becoming permanent residents of the several county seats in the circuit where he had practiced for so many years. The result was, he became the much-beloved senior member of the bar. No young lawyer ever practiced in the courts with Mr. Lincoln who did not in all his after life have a regard for him akin to personal affection."

This trait is indicated by the following experience that the late Jos. C. S. Blackburn, distinguished Confederate soldier and United States Senator from Kentucky, was fond of relating. Blackburn, then a very young man, was appearing for the first time in the United States Circuit Court in Chicago. The opposing counsel was Isaac N. Arnold, one of the ablest members of the Chicago bar, an intimate friend of Mr. Lincoln and, later, his biographer. When the case was called for hearing, Blackburn was so nervous that he made but a feeble effort. "I was about to sit down," he relates, "and let the case go by default, as it were, when a tall, homely, loose-jointed man, sitting in the bar, whom I had noticed as giving close attention to the case, arose and addressed the court in behalf of the position I had assumed in my feeble argument, making the points so clear that, when he closed, the Court at once sustained my demurrer. I didn't know who my volunteer friend was, but Mr. Arnold got up and attempted to rebuke him for interfering in the matter, when I for the first time heard that he was Abraham Lincoln, of Springfield. Mr. Lincoln, in his good-natured reply to Mr. Arnold's strictures on his interference, said that he claimed the privilege of giving a young lawyer a boost when struggling with his first case, especially if he was pitted against an experienced practitioner. Of course, I thanked him and departed from the court as proud as a young field marshal. I never saw Mr. Lincoln again, and he died without ever knowing who the young, struggling lawyer was he had so kindly assisted and rescued from defeat in his maiden effort before a United States tribunal."

The close of Lincoln's legal career found him one of the leading advocates of the Illinois bar. By industry and his own peculiar genius, he had slowly, steadily forged to the front of a most unusual body of men whose names and achievements are written large upon the pages of the history of their state. Of that gay company that held its evening sessions of song and story and merry badinage in Judge Davis' room, fame came to them all. Logan became one of the greatest lawyers of the Northwest: Lamon, Marshal of the District of Columbia; Stuart and Swett and Ficklin and Baker and McClernand went to Congress, McClernand became a major general in the Union army and Baker was killed at the head of his regiment at the battle of Ball's Bluff; Yates and Oglesby and Palmer became Governors of Illinois; Trumbull, Yates and Oglesby went to the United States Senate; Browning succeeded Stephen A. Douglas in the Senate and was later Secretary of the Interior under Lincoln; Judge Davis was appointed by Lincoln to the Supreme Court, later resigned to become a Senator from Illinois, and, through wise and early investments in Chicago real estate, became a millionaire. It was against such men as these that Lincoln had won his way.

He enjoyed the confidence of the high and low, rich and poor. The fact that he represented many of the largest corporations in Illinois, including the Illinois Central and the Rock Island railroads, did not lessen his popularity in any degree with the masses of the people. And how well he did his work is shown by the records themselves. Of one

hundred and seventy-five cases reported from the Supreme Court of Illinois, he won ninety-two and lost eighty-three; of ten cases in the United States Circuit Court, he won seven and lost three; of three cases in the United States Supreme Court, he won two; and of the hundreds of cases that never were appealed from the trial court, he won many more than he lost.

But Lincoln's career as a lawyer came to an end just as the tragic year of 1861 began. The carefree days on the Old Eighth Circuit were gone never to return. He had been elected President of the United States. Destiny had placed in his toil-worn hands the distracting problems of a disintegrating Union.

Monday morning, February 11, 1861, dawned gloomy and dismal. Dark, heavy clouds hung low and a drizzling rain was falling. It was the day of Lincoln's departure for Washington. His trunks had been roped by his own hands and, with a sad heart, he had helped lift the luggage into the dray that hauled them to the station. Long before eight o'clock, the time scheduled for the departure of the special train, hundreds of Lincoln's friends, without distinction of party, gathered at the dingy station of the Great Western Railway, waiting to say good-bye to their old neighbor and fellow-townsman.

At exactly five minutes to eight, the presidential party boarded the train and, a moment later, the President-elect appeared on the rear platform. It was apparent that he was deeply moved as he stood looking out upon the vast throng, struggling to control his voice. The strange past rose before him. It seemed only a little while ago since he had ridden into Springfield on a borrowed horse, a penniless stranger. Then, lifting his hand to silence the applause, with head uncovered in the falling rain, his deep-set eyes filled with tears, he spoke a few brief words of farewell:

> "My friends:—No one, not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people, I owe everything. Here I have lived a quarter of a century and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave, not knowing when or whether ever I may return, with a task before me greater than that which rested upon Washington. Without the assistance of that Divine Being who ever attended him, I cannot succeed. With that assistance, I cannot fail. Trusting in Him, who can go with me, and remain with you, and be everywhere for good, let us confidently hope that all will yet be well. To his care commending you, as I hope in your prayers you will commend me, I bid you an affectionate farewell.

There was scarcely a dry eye in the crowd as Lincoln finished and the train rolled quietly out of the depot. The locomotive slowly gathered speed and the assemblage began to disperse and seek shelter from the rain, but the tall, bare-headed figure, with the chilling wind whipping about his gaunt form, one hand on the old-style brake, still stood on the rear platform, looking back for a last glimpse of those he loved and was leaving forever, until the train disappeared in the murky distance, carrying Lincoln, under leaden skies, out through the mist to martyrdom.

CURRENT LEGISLATION

Legislative Contribution to Progress*

BY THOMAS I. PARKINSON
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THE great quantity and the bad quality of our statute law has long been the subject of vigorous criticism. Indeed, there is no more popular after-dinner sport than devising new phrases in which to picture our legislative mills grinding out laws in feverish competition for leadership in quantitative production. Current criticism, though more picturesque, adds little to Alexander Hamilton's warning. "The facility and excess of law-making," says the Federalist, "seem to be the diseases to which our governments are most liable"; and again: "It will be of little avail to the people that the laws are made by men of their own choice if the laws are so voluminous that they cannot be read or so incoherent that they cannot be understood." American critics like to contrast the law-ridden state of our people with the freedom from meddling statutory regulation said to be enjoyed in England; but the following from a recent edition of the *Saturday Review* indicates that this political disease is no American monopoly: "We have arrived," says the English critic, "at the stage where the aim seems to be the largest possible number of laws and regulations and those such as excite derision."

That we may not merely indulge in generalities, the Manager of the Association has furnished us with the results of a very interesting statistical legal research. In the various legislative sessions of Congress and the state legislatures during the last twenty years there have been introduced 954,625 separate and distinct bills or legislative proposals. Of this total Congress has been deluged with no fewer than 291,848 bills. In the proposal of state laws New York and Massachusetts lead all the rest with 62,611 and 48,282 bills introduced. Wisconsin and Kansas, long considered the hotbeds of legislative experiment, show the comparative modest totals of 14,880 and 17,527. It is comforting to note that the figures show a marked decrease in the number of bills introduced in the past five

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years as compared with the period from 1906 to 1911. This is especially true in Congress where the number of bills in the sessions of the past five years is about one-third of the number introduced in the sessions between 1906 and 1911. It may be that these figures are explained by the progressive urge which flourished in the earlier period or, as seems more likely, by the reduction in the number of relief bills due to improvement in Congressional handling of private claims.

We must remember that these huge totals are for bills introduced, not laws enacted. We are apt to over-emphasize the number of bills introduced as a legislative evil, forgetting that freedom to introduce bills proposing changes in our laws is a part of the constitutional right to petition the Government for redress of wrong; it is a safety-valve for the pressure of a sense of injustice or a desire for change. The more serious matter is the selection from this mass of introduced proposals of those bills which merit legislative approval, and the "mechanics of law-making" by which the bills selected for enactment are converted into binding rules of law.

This process of legislative selection resulted in the enactment of 233,563 separate statutes or about one-fourth of the total bills introduced. The slaughter of undesirables was greatest in Congress where only 13,463 enactments resulted from 291,848 bills. In the states, North Carolina, with 15,113 enactments out of 25,788 bills, New York, with 14,230 enactments out of 62,611 bills and Massachusetts, with 12,200 out of 48,282 bills, make the principal contributions to our statute book. Wisconsin and Kansas, with the modest totals of 6,256 and 3,585 enactments, seem conservative by comparison.

Moreover, the total number of laws enacted by all the legislatures seems to be decreasing. Taking the "on" and "off" legislative years together, the figures for 1924 and 1925 combined show a total of 22,000; whereas for 1920 and 1921 combined the figures show a total of 26,000; and for 1906 and 1907 combined the figures show a total of 28,000 enactments. When we subtract from these figures the temporary, private, local and purely administrative enactments we find still less cause for alarm in the quantity of legislative production. An analysis of legislative enactments in a few typical states shows that the permanent laws passed during the years 1915 to 1924 affecting the general public averaged per annum as follows: Louisiana, 140; Indiana, 140; North Carolina, 160; New York, 300; Wisconsin, 340; California, 370. These figures indicate that there is nothing appalling in the mere number of our new statutes. Those of us who have occasion to note what Sir John Salmond has called "the raging torrent" of law reports containing the current decisions of our courts will find little to choose, from the point of view of volume, between legislative and judicial contribution to the development of our law.

Without further attempting to interpret the figures disclosed by this study of the volume of our legislation—and I realize that, like most statistics, these are capable of widely-differing interpretations—I desire to call your attention to the legislation which relates especially to life insurance. While the number of bills dealing with life insurance has increased from 1,300 in 1909 to 2,300 in 1925 and ran as high as 3,300 in 1923, the number of life insurance laws enacted has been comparatively constant, ranging from 104 to 159 in the principal legislative years. Expressed in percentages we find that the number of life insurance laws enacted declined from 9.69% of life insurance bills introduced in 1909 to 4.44% of such bills introduced in 1925. In the same period the percentage of bills introduced dealing with all subjects which became statutes has increased from 20.97% to 33.17%. To me these figures indicate both a reduction in the number of irresponsible insurance proposals and a growing tendency on the part of legislatures to look to responsible insurance officials for guidance in the development of our insurance laws. They also suggest both a partial realization and an opportunity from the point of view of life insurance companies. We have improved and we may still further improve the legislative product with which we are most concerned by not merely opposing undesirable legislation but by contributing in detail to the development of desirable legislation. My experience with legislation justifies the comment that the desirability of legislation depends, in most instances, not upon any general considerations, but upon detail. A workmen's compensation bill is not good or bad in general. It is good or bad in detail and the same may be said of many other current legislative proposals.

The translation of a legislative idea into an effective statute is not, to use the words of a Bar Association President, "a pastime for a summer afternoon." John Stuart Mill, a legislator as well as an economist, says "there is hardly any kind of intellectual work which so much needs to be done . . . by minds trained to the task through long and laborious study as the business of making laws," and yet we, in this country, acting upon the premise that the legislator's duty includes not only determination of questions of general policy but also the phraseology of the statute necessary to give effect to an approved policy, have been leaving the preparation of our statutes to men who, though representative of their communities, know nothing of the science of legislation. The resulting difficulty with much of our legislation is expressed by an English Court's criticism of the British workmen's compensation act "that the draftsman has apparently not worked out on paper in legislative language the scheme which he had in his head."

American legislators have been slow to recognize their need of competent draftsmen. When Senator Root proposed a legislative draftsman for Congress he was told by leading Senators on the floor of the Senate that they did not propose to turn over to a "schoolmaster" the responsibility for lawmaking which their constituents had vested in them. It is to the credit of Claude Kitchin, Democratic leader of the House during the Wilson Administration, that he recognized the need and persuaded Congress to provide official draftsmen who are contributing so much of improvement in the form and phraseology of the Federal statutes. The leaders in Congress of both parties now recognize the distinction between the policy-determining function of the representative and the legislative drafting function in the exercise of which the representative is entitled to have competent technical assistance. What Mr. Kitchin then established exists today in the hands of men who, in my opinion, are the most competent draftsmen employed by any

parliamentary body in an English-speaking country. I think it is little known, even among the lawyers of the country, that the draftsmen now serving the House and the Senate in Washington are doing as splendid, as accurate and as fine drafting service as anywhere in the world is being given to a legislative body.

The legislative draftsman constantly finds his path beset with tantalizing difficulties some of which are inherent in the English language. One legislature, determining to deal vigorously with accidents at railroad grade crossings, provided that when two trains approach a grade crossing from different directions they should both come to a full stop and that neither should start up again until the other had fully crossed. That makes up in effectiveness what it lacks in practicability.

Governor Hodges cites a Kansas hotel act which requires that "all carpets and equipment used in offices and sleep-rooms including walls and ceilings must be well plastered."

There is still on the Federal statute books a provision "that no sponges . . . shall be landed at any port in the United States of a smaller size than four inches in diameter." How many of our ports could qualify for the reception of imported sponges?

"A legislative commission engaged in drafting a workmen's compensation act after providing compensation for the widow of a killed workman defined the term widow as "only those who are living with the decedent at the time of his death." In order to avoid the possibility of a plurality of claims the commission in a later draft presented the following definition: "The term 'widow' shall include only a widow living with the decedent at the time of his death." What the commission was evidently trying to say was "the decedent's wife living with him at the time of his death."

In emphasizing the defects of our legislative enactments we must not be unmindful of the fact that similar and equally serious flaws are frequently present in other legal documents which are not prepared by our legislatures. The best of our lawyers have not been able to overcome the difficulties of form and phraseology which account for so many of the failures of our legislators. The Marine insurance contract was not drawn by legislators and while it has the merit of brevity it would hardly be selected as a model of concise and definite legal phraseology. The standard fire insurance contract can boast of no superiority in form and phraseology when compared with the average workmen's compensation act.

Even a cursory reading of our life insurance policies, especially the disability clauses, will furnish added illustration that the difficulties inherent in the formulation of precise and effective legal documents are not confined to the realm of the legislator. How many of our contracts still contain a warranty by the applicant that he has no "daily average" use of alcoholic liquor notwithstanding the fact that without having a "daily average" he may be periodically an enthusiastic partaker? How many still contain a warranty that the applicant has not within a specified time "changed his domicile" for the good of his health, notwithstanding the fact that without "change of domicile" the applicant might have traveled or even lived abroad on the advice of his physician for the purpose of regaining shattered health?

The incontestable clause was originally framed not by legislators but by lawyers. It was a good example of concise and simple phraseology. The policy, it said, should be incontestable after two years from its date of issue. The fact that the phrase "date of issue" had no definite meaning did not occur to the draftsman. For twenty-five years this clause was generally used before an astute representative of a claimant raised the contention that a policy became incontestable after two years from its date of issue even though the insured died before the end of that period. Life insurance lawyers were confident that the incontestable clause as originally phrased meant that the policy should become incontestable only in case the insured lived through the period of two years; but the Supreme Court of Illinois, and later the United States Supreme Court, held that the policy was incontestable after two years irrespective of the earlier death of the insured and that if the insurance company meant to make the incontestability of its policies depend upon the insured's living for the full period of two years it should have said so in the contract. Following the suggestion of these courts recent amendments in several states have specifically provided that life policies shall be incontestable only if the insured lives through the period of contestability. Experience has taught us that not brevity alone, but brevity coupled with precision, though difficult to attain, is desirable in private as well as public legal documents.

More and more the insurance business and the terms of insurance contracts are being subjected to statutory regulation and it becomes of increasing importance to us that these statutes be not only founded in good policy but also accurately expressed in every detail. A legislative policy unless embodied in legislative language which gives effect to it is of small value. No better illustration could be desired than the California community property law of 1923. The decision in the Bank of Italy case in January, 1923, established the principle that no disposition of the proceeds of an insurance policy could be made without compliance with the California laws governing gifts of community property. The court on an application for a rehearing had refused to declare to what extent the decision affected the duties of life insurance companies with respect to the payment of policy proceeds. The statute was passed for the purpose of defining these duties and relieving the companies of the confusion which the decision threatened. This statute failed to accomplish its purpose because the legislative policy which had prompted its enactment was not fully or accurately expressed. I speak of that particular statute, not because it is the only one, but because it is typical of the point that I am attempting to emphasize, that precision is difficult, whether it is attempted by a member of Congress or by the representative of a private interest, and that legislation is good, bad or indifferent more because of its detail than because of its general purpose.

The defects of our statutes merit the criticism and derision which are daily heaped upon them. I am not attempting to divert this criticism to contracts and other legal documents formulated by counsel for private interests, but I am endeavoring to emphasize the importance of detail and precision

in all legal documents including statutes. Wise and effective legislation is dependent upon attention to detail. It requires power in the legislator to analyze the problems which confront him; wisdom in selecting from available alternatives, and skill in the use of language. But it is not the legislator alone who should have these qualities. The representatives of private interests likewise have a duty and an opportunity to contribute to the making of better laws and my experience as counsel for the Committees of Congress in the preparation of legislation immediately after the War has convinced me that the representatives of private interest can and should improve their contributions to the development of legislation. They must do something more than oppose undesirable legislation; they must co-operate in working out the details of desirable legislation. There are some legislative proposals which private interest should flatly and unalterably oppose, but there are others which have merit and which may prove less burdensome if those most familiar with the subject matter co-operate in their formulation. Some of the regulatory laws now on the statute books to which big business strenuously objects might not have been there at all or might not have subjected private enterprise to such drastic regulation had the representatives of the interest affected realized that unqualified opposition sometimes irritates legislators to more drastic enactments than would have resulted from friendly cooperation in selecting the desirable from the undesirable while the proposal was pending. The Federal Reserve law is a good illustration of legislation which private interest finally determined was desirable and unavoidable and which they thereupon helped to make as effective as possible. I have in mind a New York statute—which I think exists in other states as well—the prime purpose of which was to abolish warranties in the law of life insurance, but which, because of lack of attention to detail, has put the life insurance contract in a position worse than any other contract under the law of this State, in that a life insurance contract cannot be set aside or reformed, even though there is deliberate fraud on the part of one of the parties in entering into it, unless that fraud appears in the papers which constitute the contract.

Our legislatures have the machinery for ascertaining necessary facts and conditions prior to legislation. We have developed the committee system so that those interested in pending legislative proposals have full opportunity to be heard before the legislature renders judgment as to what constitutes the dominant public interest. If we make the proper use of this machinery our legislatures might in fact be what the legislature of Massachusetts is in name, a General Court in which a representative judgment may be reached after full presentation of the conflicting interests involved. In the complexity of conditions under which we live a representative legislature properly informed is often a better agency than a judicial court to determine what rule of law is best suited to the needs of the entire community. I have in mind the Workmen's Compensation Act. The courts might, through a long period of years, have developed a more satisfactory system of rules under the common law of employers' liability, but the courts could never have developed any such system as that which the legislature gave us in the Workmen's Compensation Law.

Committees of Congress and of our state legislatures have not always had the help upon which they are dependent and to which they are entitled. Not infrequently I have seen the representative of a private interest at a committee hearing learn more about the subject under discussion than he contributed and I have subsequently heard him in the hotel lobby or in the smoking room of the Congressional Limited generalizing upon the shortcomings of our legislators. The representatives of a steamship company once provoked the chairman of a House committee to complain that the lawyers for the company talked of nothing but the construction of steamships and their naval architects talked of nothing but the construction of statutes. General statements and lengthy briefs furnish little help when the issue is not whether a law shall be passed but what form the law shall take, to whom and under what conditions it shall apply, and by whom and in what manner it shall be enforced.

I remember when the representatives of the dye industry of the country, their lawyers, their executives, landed in Senator Penrose's office one Saturday afternoon urging immediate action to protect the industry. It took that very keen statesman and legislator just about twenty minutes to convince them that whatever they needed, they certainly did not want that which they themselves brought to him and proposed. I saw him, likewise, after the representatives of the fruit-juice industry of the country had got through the House, and brought to the point of a favorable report from the Senate Committee, a bill which they seriously desired for the protection of their industry—I saw Senator Penrose point out to them that the bill was so completely defective, though it had been passed by the House, that, if he put it on the statute books as they asked him to do, it would not accomplish the purpose which they had in mind. I don't like to be critical, too definitely critical, but I have seen enough to venture the suggestion—and this seems to be the opportunity to make it—that those who represent private interest before the legislative committees must get down to brass tacks if they are going to be really helpful in the development of current legislation. Even the representatives of the railroads—and they perhaps are among the best in the country—in the formulation of the Transportation Act, up to 24 or 48 hours before the Act was passed, submitted their suggestions in general form, in a form in which they could not possibly be passed at that time, and it was only by the effort of the representatives of the committee themselves, that some of the most important provisions of the Transportation Act were converted from generalities into the legislative provisions of that law.

In the conduct of modern business we find ourselves constantly in need of new standards which must be worked out either by those engaged in the business or by some public authority. Freedom to organize new business units, coupled with competition, develops abuses, unethical practices, waste, and a general lowering of standards which militates against everybody engaged in the business. The abuse may take the form of the employment of child labor, the employment of women at unsuited tasks, the use of the tying contract or other unfair trade practice, rebating, or the shipment of second-rate

oranges from a state which has pride in its fruit. These tendencies to lower standards are recognized by the recent report of the National Distribution Conference proposing an unofficial tribunal organized by business itself to work out and bring about the adoption of higher business standards. The difficulty with schemes for self-improvement is that competition and self-interest on the part of backward units prevent desirable progress. Nevertheless, such cooperation and such effort within the field of private business is commendable and without it standards established by legislative bodies are likely to be unsuited to the needs of business and ineffective to accomplish the legislative purpose. Standards which have been thus worked out by business men generally need to be made compulsory by legislation so that he who would without compulsion obey may not be at a disadvantage in competition with him who will obey only when compelled.

The common law standards of conduct were developed by judicial decisions establishing general rules. These rules had the advantage of flexibility, but flexibility is not an advantage when definiteness is desirable. Legislation is at its best when it meets the modern demand for definiteness in our rules of law. A statute which is aimed at an ascertained evil is therefore likely to give more satisfaction than one which attempts to anticipate and deal with evils that still dwell beyond the horizon. Statutes condemning rebates, for example, whether in insurance premiums or in carriers' rates have been generally effective and satisfactory. When, however, the legislature instead of confining its statutory prohibition or requirement to demonstrated and recognized evils, attempts to provide a catch-all for evils which may arise in the future, it loses the advantage of definiteness and lays the basis for irritation and confusion in the application of its generalities by the courts or administrative officers.

What I have in mind is illustrated by legislative enactments which condemn as nuisances buildings "especially liable to fire," penalize "improper speed," condemn to destruction "inferior grades" of goods, make it criminal to charge "unreasonable rents," or penalize failure to provide "proper and sufficient" ventilation in factory workrooms. The problem of delegation of legislative power and of administrative discretion in the enforcement of general legislative standards is one worthy of more extensive treatment than my time permits of; but the tendency to delegate or to vest unqualified discretion is one of the gravest causes of waste of public funds, inefficiency in enforcement, and of irritation to individuals who cannot tell what the law requires of them until it has been judicially applied to them.

Out of all of that, the principal point that I want to make is: the desirability of legislation depends upon detail. We are bound to have some legislation. The complexity of the life in which we live cannot be met by the development of the common-law rules alone. We are, I say, bound to have legislation. The desirability or the undesirability of that legislation will depend, in most instances, upon detail. Our legislatures—Congress in Washington and those in the states—are making an effort to get down to brass tacks on the details of modern legislation. My appeal is to the representatives of the private interests and to the newspapers to get down to like brass tacks, and I have no hesitancy in saying that the men who represent the House and Senate committees today on important pending legislation are abler at their job than the men who represent the private interests who are constantly concerned before those committees.

It is obvious that if legislators and legislative draftsmen are to attain even a reasonable degree of definiteness and accuracy in legislation they have need of all the information and suggestions we can give them. With particular reference to life insurance legislation it is our duty, and I believe it is also our opportunity, to cooperate with legislators and administrative officers in bringing about greater accuracy and uniformity in the prohibitions and requirements of statute law. Fortunately, we have attained a substantial degree of uniformity in the policies which underlie life insurance legislation, thanks to the influence of that great lawyer and legislator, Judge Hughes. The legislation which he drafted for New York in 1906 still constitutes the principal contribution to the insurance laws of this country, but the carelessness of other draftsmen or their individual preferences in the use of language and the constant addition of amendments have combined to bring about lack of uniformity in detail and unnecessary variety of phraseology.

Calendar of Coming Events

American Bar Association Meets at Denver, Colorado ..... July 14-15-16

Committee on Commerce, Trade and Commercial Law Holds Public Hearings in Chamber of Commerce Building, New York... April 13-14-15

Conference of Bar Association Delegates Holds Special Meeting at Washington, D. C..... April 28

American Law Institute Holds Fourth Annual Meeting at Washington, D. C..... April 29-30 and May 1

Texas, Arkansas and Louisiana Bar Associations Hold Joint Meeting at Texarkana..... April 30 and May 1-2

Iowa State Bar Association holds Thirty-second Annual Convention at Davenport..... June 17-18

Illinois State Bar Association Holds 50th Annual Meeting at Rock Island-Moline..... June 24-25-26

The Conference of Commissioners on Uniform State Laws Meets at Denver..... July 6-10

Commercial Law League Holds 1926 Convention in San Francisco in Week Beginning..... July 19

Where to Write for Citizenship Publications

In making mention in the January issue of the recent publications of the Citizenship Committee of the American Bar Association, "The Real George Washington" and "The Constitution and the Declaration of Independence, with Introduction" —the address of the Committee was inadvertently omitted, with the result that a large number of requests for these publications have come both to the American Bar Association Journal and to the Secretary of the Association. All such requests should in future be sent directly to Hon. F. Dumont Smith, chairman American Citizenship Committee, First National Bank Building, Hutchinson, Kans.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR, MANAGER
Journal Office: 1612 First National Bank Bldg., 38 South Dearborn Street, Chicago, Illinois.

THE LAWYER AND THE WORLD COURT

At the annual meeting of the American Bar Association in 1923 the recommendation of President Harding that the United States should adhere to the Protocol for the establishment of the Permanent Court of International Justice, with the reservations drafted by Secretary Hughes, the purpose of which was to make it certain that we were joining the Court and not the League, was approved by an almost unanimous vote. Although the legal profession was and is divided in opinion as to the entry of this country into the League of Nations, it is not far from substantial accord in the support of the position of Harding and Coolidge, Root and Hughes. On the other hand, it is quite evident that outside the legal profession, opposition to the Court comes from, and is usually frankly attributed to, opposition to the League.

An examination of the difference in view-point of the lawyer and layman in regard to the question will be interesting and perhaps instructive.

At the outset it will be seen that the lawyer discriminates between the Court and the League, while the layman who opposes the Court does not. The Congressional Record and the editorial pages of the anti-Court press plainly disclose that one of the chief objections made to the Court is its supposed relation to the League.

The lawyer is not disturbed by this consideration. First of all he has learned that a judge worthy of the name will not allow political or personal considerations to move him in the decision of a disputed point of law or in the administration of justice. The reason for this goes far back. The lawyer learns that "Justice is the highest concern of man upon earth"; he knows that the judicial institution is made to insure a just decision of controversies, and that unless this institution accomplishes this purpose, civilization will retrograde towards barbarism, for there can be no peace without justice and no civilization without peace. The lawyer therefore recognizes that courts are institutions devised for the determination of controversies according to the right and justice of the case; that even though, being human institutions, they have their imperfections and at times err, they are on the whole safely to be depended upon as the best assurance of justice. His mental attitude therefore towards the proposal to create a tribunal for the decision of disputes between nations according to the principles of right and justice is hopeful and confident.

The lawyer is not disturbed by the cry that the Court is a League Court. He practices every day before courts which were actually constituted by legislatures and he has never seen an instance where that fact interfered with the attainment of justice. He knows that in a controversy as to the validity of a statute or a tax, the judge will give him judgment if he produces the proof required by the law, and that the fact that the judge's salary comes from public funds and is fixed by legislative act never influences his decision.

If he has studied the decisions of the Supreme Court of the United States rendered in the exercise of that part of its jurisdiction most analogous to that of the World Court, the settlement of controversies between the states of the Union, he is more than ever reassured that the substitution of justice for force in the settlement of disputes between nations is founded on sound analogies and justified by the success of our own experiment. In fine, he has learned the difference between political agencies and judicial tribunals and knows that with very rare exceptions the ruling passion of the judge is for justice and that he is a ministering priest in its temple, devoted to its service.

The lawyer also realizes that courts do not deal with political questions as such, but that they find and declare the facts in dispute and the law applicable to such facts.

When the lawyer hears objection to the World Court on the ground that there is no adequate body of international law he won-

ders if the mighty function of the courts in promoting the growth of law is understood. He believes that just as the unwritten law has been developed and enriched by the very existence of courts in which it may be studied, applied and declared, so too the law of nations will expand and evolve from the very fact that it has been assigned a field in which it may be exercised and nurtured and thus grow to its full stature.

The lawyer also knows the difference between arbitration and adjudication. In a resort to the former of these two methods of settling disputes each side selects its representative and if those so chosen cannot agree, they choose a third, as umpire. The persons thus chosen to represent the respective sides of the controversy are not judges, they are advocates. The third person, even if he desire to act as a judge and to decide the controversy according to the right and justice of the case, is placed in an environment which makes it almost impossible for him to do so. His ears are assailed by the contentions of his associates, who are not amenable to his views of right and justice but are maneuvering to get every possible advantage for the party whom they represent. In the end, the umpire can do nothing but bring about a compromise in which neither law nor justice cuts any appreciable figure. He knows that arbitration is justified and valuable only where substantial saving of time and expense can be accomplished, and then only in a comparatively limited class of controversies where the dispute involves questions of fact rather than the application of principles of law. So he is not moved by the arguments of those who ask: "What controversy between nations that could be submitted to the World Court could not also be submitted to The Hague?" He answers this question with another: "What controversy between persons that could be submitted to the decision of the existing civil courts could not also be submitted to arbitration?" and he adds: "None, but is that any reason why courts should be abolished? Do we not need both institutions, each to exercise its own appropriate functions?"

But while the professional and lay viewpoints may differ in the above particulars, there are some things as to which intelligent and patriotic citizens of both classes, when not inflamed by political or other considerations, are generally found to agree.

The first of these is based on the very simple conception of fair play. After an issue has been fought out fairly and in the open and over a long period, and a decision has been rendered which leaves no doubt as to the national will, fair play certainly demands that a reasonable opportunity be given to try the thing out and show in actual practice whether it will work or not. This opportunity means, of course, freedom from obstructive and harassing tactics, which are a sort of guerilla warfare after the war of open and honorable combat has ended—the consequences of a mental complex in which considerations of personal political vindication generally play an unnecessarily prominent part. They exemplify what has been aptly termed "the bull-dog's conception of honor," which is never to let go under any circumstances whatever, if he can possibly help it.

Again, lawyers and laymen are generally agreed that our country should present, as regards its relations to other countries, a united front. This is necessary both from the standpoint of dignity and national effectiveness. Where the very question of the nature of that relation is an issue, as was the case with the League of Nations proposal, and when a decision by our regular constitutional means has not been reached, there is naturally the widest range for domestic discussion, opposition or obstruction. But when the representatives of the people have spoken in the way the Constitution provides—and spoken overwhelmingly—a decent respect for the position of our country before the world and in its relations with the world certainly demands an attitude of support and not of continued opposition.

A great American has said, in substance, that our domestic divisions, though bitter, "stop at the water's edge." Here is a good occasion to apply that principle, without which there can be no great America in international affairs.

HELP THE PROCEDURE BILL

Members of the Association and all other lawyers should do their utmost to help secure the passage at this session of Congress of the bill giving the U. S. Supreme Court power to make rules on the law side of the Federal Courts—the same power that it now has on the equity side. It is not necessary here to repeat the convincing arguments for this measure. Write a personal letter to your senators and congressmen urging active support.

THE ADVISORY FUNCTION OF THE WORLD COURT

Examination of Contention that Obligation to Give Advisory Opinions Seriously Threatens the Independence of the Permanent Court of International Justice—Valuable Information Furnished by History of Advisory Opinion in United States, England and Canada and in the Practice of the World Court Itself.

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THE Senate is not guilty of undignified precipitance in the consideration of matters of exceptional importance. The Statute which established the Permanent Court of International Justice came into force in September, 1921. The Protocol of Signature to which the Statute was annexed, a kind of expansible enacting clause, expressly provided that it should remain open for signature by any member of the League of Nations, and also by any of the states mentioned in the Annex to the Covenant. The last phrase, it was well understood, was introduced in order to facilitate the adhesion of the United States to the Statute. On February 24, 1923, President Harding sent a message to the Senate in which he stated that "our deliberate public opinion of today is overwhelmingly in favor of our full participation, and the attending obligations of maintenance and furtherance of its prestige," and asked the Senate to consent to our adhesion to the Protocol, subject to the four reservations that have since been generally called the Harding-Hughes terms. Senator King promptly introduced a resolution to give effect to this recommendation, but the Senate, by a vote of 49 to 24, expressed its disinclination to be hurried into any rash action, and the matter went over to the 68th Congress. President Coolidge in his first message to Congress, on December 6, 1923, endorsed the proposal of his predecessor and commended it to the favorable consideration of the Senate. Six resolutions relating to the subject were introduced during this session and referred to the Committee on Foreign Relations, and one of these was reported out to the Senate but did not come to a vote. In his message of December 3, 1924, the President renewed his recommendation that the United States adhere to the Protocol, adding a fifth reservation—that the United States should not be bound by advisory opinions of the court "upon questions which we have not voluntarily submitted for its judgment." The House of Representatives expressed its approval of the Court and of the Harding-Hughes-Coolidge plan by a large majority. The Senate, however, was too busy in this short session to find place for a debate upon the matter and Senator King's resolution to secure the adhesion of the United States was promptly blocked. But the issue was at once revived when the Senate met in special session by resolutions of adhesion introduced by Senator Swanson and Senator Willis, and before adjournment was taken it was agreed, by a vote of 77 to 2, that on December 17, 1925, the Senate would consider the resolution of the former in open executive session.

The long awaited debate has come and gone. On twenty days in all, a crowded gallery and a varying number of senators listened to exposition and argument, praise and blame, history and prophecy. For the first time since November 15, 1919, the closure was invoked, ending a filibuster that threatened disaster to the program of the administration. The Senate is on record, 76 to 17, as favoring the adherence of the United States to the Protocol and Statute of the Court, subject to a series of reservations and understandings that go considerably beyond the proposals submitted nearly three years. Still the issue is by no means closed. The President must act, and forty-eight other states, signatories of the Protocol, must indicate through an exchange of notes their acceptance of all these reservations and understandings. Meanwhile the fight is to be transferred from the Senate chamber to the people and may be made a specific issue in the senatorial elections next November. The recognized leader of the opposition to the recommendation of two presidents is Senator Borah, the chairman of the Committee on Foreign Relations. He has announced that he proposes to give "whatever of energy and ability" he possesses to the undoing of the Senate's action. The history of the part the United States has played in the movement to establish an international judicial tribunal and the wide attention the World Court has attracted in this country sufficiently attest the importance of the question. It is, therefore, highly desirable, assuming that the foreign policy of a democracy bears some relation to the popular will, that there should be a frank and critical examination of the reasons why the senior senator from Idaho, whose sincere devotion to the cause of peace is not questioned, should oppose so persistently the participation of his country in an enterprise conceived for the purpose of substituting reason for force in the settlement of as many international disputes as possible. Those reasons have not alway been the same, or perhaps one should say the emphasis has shifted from one to another during the past three years. The senator made a full exposition of his attitude in an address delivered in Boston on May 11, 1925, and stated his position so clearly and explicitly that we may fairly assume that we have in this address the essentials of the argument upon which he will rely in his appeal to the people. His more recent speech of October 19th at Chicago is but a reiteration of this position, and the speeches he contributed to the discussion in the Senate show clearly that he intends to hew to the line so carefully drawn in Boston.

The argument is simple and direct.[1] The parent age of the Court is now of no concern to him. It

*Author of a work on advisory opinions entitled "Departmental Cooperation in State Government," (1918).

1. The text of the Boston speech as given in the *New York Times* on May 12th is followed.

makes no difference from what source the Court comes, provided only that it meets in any sense the tests of a court, namely, that political questions shall not be submitted to it and that political influences shall not control or dominate it. The World Court does not satisfy these tests. "The fundamental objections to this court, as it now exists, is the right or authority which the League of Nations is given to call upon the court for advice or counsel and to treat it in a large measure as a Department of Justice of the League." The Council or Assembly may ask the Court for an opinion upon any dispute or any question, "legal, political or mixed." This places the Court under greater pressure than it should be called upon to resist, and the League will naturally take advantage of the provision to add to the duties and responsibilities of the Court. An excellent illustration of this tendency is at hand in the proposed Geneva Protocol, which would materially add to the duties of the Court. "If we are to be the advisers and counselors of the League," better to be a full-fledged member, "in the hope that we might exercise some influence at the source." In short, the senator will have nothing less than an independent judicial tribunal, and this the World Court will not be as long as it is burdened with the advisory functions imposed upon it by the Covenant of the League. In these functions, he declared in a radio debate held the evening after the vote was taken in the senate, he sees "the close relationship and the dangerous relationship of the court to the League of Nations."

So runs the brief of the case, and the issue is clear-cut and unmistakable: Does the obligation to give advisory opinions to the Council or Assembly of the League of Nations seriously threaten the independence of the Permanent Court of International Justice? The discussion need not take place in the clouds of theoretical speculation and dogmatizing, for the advisory opinion has had an instructive history in the United States, England and Canada, and the practice of the World Court itself during the last four years furnishes some very valuable information.

From time immemorial the King of England has enjoyed the privilege of seeking the advice of his judges in connection with his judicial and executive duties, and the practice has fallen into desuetude in recent years only because he has in the Judicial Committee of the Privy Council as well qualified legal advisers as he could desire. So, too, the House of Lords often asked the judges for their opinions on questions of law arising in cases that were before the House sitting as a court, until the statute of 1876 assured the presence of certain law lords. Similarly, the House may ask their advice in connection with its legislative activity, and at one time did so frequently. The advisory opinion came into American governmental practice through the Massachusetts Constitution of 1780, which placed it at disposal of either house of the legislature, or the governor and council. From this it found its way, with various modifications, into the constitutions of New Hampshire, Maine, Rhode Island, Missouri, Florida, Colorado and South Dakota. The device was omitted from the Missouri constitution at a general revision, but still flourishes in all the other States. Indeed, many advisory opinions have been given in States that make no constitutional provision for them, though in recent years judges have become more reluctant to act in an advisory capacity without constitutional compulsion. However, the Alabama legislature, in 1923, passed a statute which imposed upon the justices of the supreme court the duty to give advisory opinions to the governor or either house, and the act has been upheld as constitutional. Altogether, the reports show about 500 advisory opinions that have been rendered in the various States. The Dominion of Canada and seven of its provinces have also adopted the advisory opinion, under statutory provision. So we are not dealing with a governmental innovation, the newness of which carries a warning of possible calamity; on the contrary, it is an institution of which we have a lengthy and illuminating experience, to which it will be profitable to refer as we examine in detail Senator Borah's argument.

A court is not a court, says the senator, quoting Secretary Kellogg, if political questions are ever submitted to it. What are "political questions?" The meaning of the phrase is decidedly elusive. It may have reference to the identity of the person or organization who deals with the question, it may relate to the nature of the subject matter involved, or it may mean merely that the question is one of "policy," wisdom or expediency. The definition, as elaborated in the constitutional practice of the United States, rests primarily upon the separation of governmental powers. Each of the three great coordinate branches of the government exercises its authority over a definite field, the limits of which are fixed in a written constitution, either in express terms or by implication. The legislative and executive departments are the political branches and matters which fall clearly within their appointed domains are political matters. The judiciary will not undertake to interfere with either department in the exercise of its discretion within these domains. It is the function of the judiciary to exercise only judicial power, that is to confine its activities to the construction and exposition of the law. The distinction here rests chiefly upon the identity of the department to which the power in question has been delegated.

But the situation is not as simple as this statement would imply. All questions do not come to Washington plainly labeled as legislative, executive or judicial in character; and the courts, in upholding the constitution as the supreme law of the land, may well be forced to ascertain, in a "case" that falls clearly within their jurisdiction, whether one of the other departments has overstepped its constitutional bounds. Thus the President is given the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachments and in the exercise of this power he has an unqualified discretion. But the Supreme Court has not hesitated to decide whether this power extended to the granting of a general amnesty, whether it took from Congress the right to pass acts of general amnesty, whether Congress may by law restrict the effect of presidential pardons, whether the use of the pardon in cases of criminal contempt invades the province of the judiciary, and other similar questions which necessitate a construction of the words of the Constitution. In other words, it is a political question whether the President is making the best use of a power that belongs to him, but it is a judicial question whether the power he is exercising does belong to him or not. Congress may regulate the manner of holding elections for senators and representatives, but the Supreme Court has dealt with the matter so far as to declare that this does not give it power to regulate corrupt practices in primary elections. Presumably a similar law applying only to the final election would be constitutional, and under such a law a candidate might well be convicted by a court and still be seated as a duly elected

senator or representative by action of the house concerned.

So, too, it makes a difference in what form the question is presented to the judiciary, and what the court is asked to do. The Supreme Court refused to grant an injunction against the Secretary of War to restrain him from carrying out the Reconstruction Acts in Georgia and Mississippi, on the complaint of these two States that the Acts in question were unconstitutional in that they enslaved the States and threatened their very existence. But the court intimated that if private rights or property had been infringed or in danger of infringement, the parties concerned might very properly have asked the court to consider the constitutionality of the legislation involved. It is one thing to attempt to control the political departments by mandamus or injunction and another to review their acts when the rights of individuals have been affected.

Nor do we attain greater definiteness if we use the character of the subject matter as a criterion for determining whether questions are political or non-political for purposes of judicial action. The power to deal with situations that are decidedly political in character may be expressly delegated to the judiciary by the constitution or by statute. Questions relating to the extent of the territorial limits of a state have been shunned by the courts in numerous cases, as being of a political nature; but the federal Constitution gives the judiciary jurisdiction over disputes between two States, and it has been settled for many years that this covers boundary disputes. The affairs of political parties and matters pertaining to elections would seem to be as clearly "political" as anything could be, and the courts in general have declined to interfere with the organization or operation of parties or the conduct of elections; but they will not refuse to apply statutes or constitutional provisions that confer upon them jurisdiction in this field, even to the extent of trying contested elections, whether primary or final.

The third definition suggested is helpful as far as it goes, for the courts have consistently declined to express their opinions upon questions of policy. But the usefulness of the definition is quite limited, for in most of the cases where judges have refused to act on the ground that a "political question" was in issue, questions of policy have been only incidentally involved if at all. The basis for the recusancy is not far to seek if the opinions in such cases are explored for the purpose of discovering the real reasons for the disclaimer of jurisdiction that are hidden behind the convenient and consecrated phrase "political question." Three principles will explain practically all the cases: (1) The court will not invade a domain that is clearly marked out by the sovereign power of the state as belonging exclusively to another organ of the government, unless it is in unmistakable terms authorized to do so. This principle depends upon the terms of the constitutional grant; it is the identity of the grantee, not the nature of the subject matter, that determines the willingness of the court to assume jurisdiction or decline it. (2) A *brutum fulmen* is abhorrent to the judicial mind; a court should not command unless it has reason to think compliance will be secured. (3) The courts will not question the expediency of the acts or the wisdom of the decisions of the political branches of the government, or, as a rule, the findings of fact upon which these acts or decisions have been based; the issues involved, not the nature of the subject matter, determine the judicial attitude: the judicial power extends to issues of law and to issues of fact upon which the application of the law depends, but not to issues of policy. These are the three motifs running through the leading cases—a scrupulous regard for constitutional boundary lines, a dislike of futility or an unwillingness to act when the purpose of the action may not be achieved, and a decent respect for the unequivocal mandate of the people's representatives to use their unfettered discretion in deciding which is the wisest course to follow. Illustrations abound for those who care to scan the pages of the reports.

When we turn to the advisory opinion, we find the situation materially altered. Here a political department voluntarily comes to the judiciary and asks for its opinion relating to the powers and duties of the interrogator, which, *ex hypothesi*, are often "political," according to the test of subject matter. But the courts have answered freely, and their opinions have been given unreservedly in hundreds of cases, where writs would have been refused or judgment denied if the petitioner had been a private person. The reason is plain enough—questions of policy are not submitted for opinions, and the other two motifs just referred to are no longer operative. The courts are not deterred by the fear of invading the rightful prerogative of another department against its will, because the invasion has been invited, and indeed, if there is an advisory opinion clause in the constitution, authorized by the sovereign power of the state. Nor is there any danger of futility, because the opinion is sought and given as advice only; the ultimate purpose for which the device exists has been achieved when the opinion has been rendered to him who seeks it. So, though the courts have refused to give their advice on some occasions, for various reasons too long to enumerate here, they have made no hair-splitting distinctions between questions of a political and those of a judicial character. It may be interesting to observe that in the Dominion of Canada and several of its provinces the statutes that provide for the advisory opinion specifically enumerate a number of questions indubitably political in character as proper objects of advice.

It would seem, then, that the statement that a court is not a court if political questions are ever submitted to it was not carefully considered. In the first place it apparently does not express exactly what the speaker intended to say. If political questions were never submitted to a court, of course we would have no cases where the court declined to act on the ground that the question involved was political. Presumably what was meant was that no court ever rendered opinions upon political questions. But even in this form, it will be evident from the foregoing discussion that there are at least three exceptions to the statement, well established in Anglo-American jurisprudence: (1) The adjudication of private rights in a case properly brought before a court may necessitate the decision of issues of a political character. (2) Jurisdiction over political matters may be conferred upon the courts by the constitution or by statutory enactment. (3) The assistance sought under an advisory opinion clause commonly relates to political questions. Will anyone seriously contend that the courts in England and the United States which recognize and apply these propositions are any the less courts because of the political questions they have decided? Are we solemnly to deny the name of courts to those tribunals in England, Canada, the Canadian provinces, and eight or more of our own States, which give their advice to the legislative and executive departments of the government when it is re-

quested? They are not to be cast out of the fold so easily or on such grounds.

Is the Permanent Court of International Justice entitled to the same consideration, or is it metamorphosed into a political organ by the obligation to give advisory opinions when they are requested by the Council or Assembly of the League? Of course, in the eyes of an Austinian lawyer, it would not be a court even without the advisory function. It has no true law to apply and can call upon no sovereign superstate to enforce its judgments. This has been true of all international courts. It will be true as long as the world is organized on an *international* basis. Yet in fact we do have a body of rules which states generally apply in dealing with other states, and the decisions of international tribunals have for the most part been obeyed. But these decisions have concerned themselves with *materia politica*. Any full-fledged case prosecuted before the World Court must needs be political in character, for the Court is open only to states or members of the League of Nations, and disputes between states are surely political if the term is ever applicable.

In reality there is less reason why the World Court should not exercise the advisory function in connection with political questions than there is for the unwillingness of municipal courts to pass upon such questions, for the first two motifs stated above are obviously nonexistent. The first rests on the doctrine of a separation of powers among three governmental organs, made equal and coordinate by the will of the sovereign people. What the judiciary will do depends upon the power granted to it by the constitution, not upon the nature of the subject matter. If the jurisdiction explicitly extends to controversies between two or more States or to contested elections or other "political" matters, it will be exercised. The World Court is independent of any other organ of international government, deriving its authority from a separate constituent treaty. But by an express provision of that treaty, its jurisdiction comprises all matters specially provided for in treaties and conventions in force. The Covenant of the League of Nations is such a convention, and by Article 14 of that covenant the Court may give an advisory opinion upon any dispute or question referred to it by the Council or Assembly. The second motif does not apply to advisory opinions at all, as already pointed out.

The third calls for special attention, for it may be claimed that Senator Borah used the term "political questions," not with the meaning that has become attached to it in our constitutional law, but in a strictly etymological sense, as equivalent to "questions of policy." Article 14 of the Covenant permits a solicitation of the opinion of the World Court on *any* dispute or question. Upon a literal reading of the clause, questions of policy may be referred as freely as questions of law. But constituent phrases do not always mean in practice what they seem to mean on paper. Strictly within the terms of our Constitution, a presidential elector could vote for a person who had never been considered as a candidate, a President could keep in office indefinitely cabinet members unacceptable to the Senate, Congress could prevent all interstate compacts, the President could pardon every federal prisoner, Congress could practically destroy the appellate jurisdiction of the Supreme Court, and countless other departures from the true course of government could occur. The Supreme Court has dealt many times with this argument of the possibility of abuse of power, and has found it unsubstantial. Our governmental institutions are not guaranteed by the solemn script of constitutions; rather are the constitutions themselves guaranteed by our political genius. We incorporate in them those devices which our political experience informs us stand a reasonable chance of working out well.

It is, then, a fair question to ask, in fact it is the vital question, whether *in all probability*, the advisory function of the World Court will ever be construed to extend to questions of policy. There is no small amount of evidence to aid us in arriving at an answer. There can be no question that it is a well established tradition in modern political society, that courts are designed to deal with questions of a legal nature. They have not the facilities for acquiring the information necessary to decide issues of expediency, nor are they in a position to give effect to such decisions if made. They are the weakest organ of the state and the one that should command the fullest confidence; their trustworthiness might well be shaken, their prestige impaired, and their very existence threatened, if they entered upon the field of political debate. Such considerations alone should be sufficient to deter the Council or Assembly from submitting questions of policy to the Court, or the Court from answering them if submitted. But there is more than the tradition, to tell us how we may expect these bodies to employ the advisory machinery. All the States of the Union that have provided in their constitutions for advisory opinions, save one alone, have expressly limited the inquiries to questions of law. The Colorado constitution in its terms was broader—"important questions upon solemn occasions"—and one might have thought the bars were down for any interrogation whatsoever. In thirty-nine years the Colorado court has been asked for an advisory opinion almost a hundred times, and there is not one instance where a question of policy has been referred to it. The statutes which authorize advisory opinions in Ontario, Nova Scotia, Manitoba, British Columbia and Saskatchewan empower the Lieutenant Governor in Council to refer "any matter which he thinks fit to refer" and in the Quebec statute the phrase is "any question which he deems expedient." The consultative privilege has been used sparingly in those provinces, and no questions of policy have been submitted.

Now let us turn to the World Court itself. Thirteen times the Court has been asked for an advisory opinion. Some of the questions, the senator says, are far more political than legal. In the absence of a bill of particulars, one cannot know to which ones he referred, but the opinion will be ventured that most lawyers would designate the issues presented by the inquiries as primarily legal in their nature. The first asks for the construction of Article 389 of the Versailles Treaty. In the next two, the competence of the International Labor Organization, a creature of the same treaty, was more carefully defined. The issue of the fourth case was whether the dispute between England and France over nationality decrees in Tunis and Morocco was, by international law, a question of domestic jurisdiction. Then came the Russo-Finnish dispute, where the Court was asked its opinion as to the extent of the treaty obligations existing between these two countries; in this case an opinion was refused, but no doubt was cast upon the legal character of the issue involved. The questions put in the next case related to the obligations of Poland under the Minorities Treaty of June 28, 1919, and those in the following case to the competence of the League of Nations under this treaty and to the proper interpretation of its fourth article. The eighth

opinion deals with the conclusiveness of a decision by the Conference of Ambassadors relating to the boundary between Poland and Czechoslovakia, and the ninth with the extent of power conferred on the Conference of Ambassadors by a resolution of the Assembly. The question submitted for the tenth opinion required a construction of Article 2 of the Lausanne Treaty. The eleventh and thirteenth inquiries related to the jurisdiction and procedure of the Council; one of these was withdrawn when the controversy responsible for it ceased to exist, the other is pending now. The questions in the twelfth opinion dealt with the effect of certain decisions made by the High Commissioner of Danzig in the exercise of judicial functions granted to him by treaty, and with the privileges of the Polish postal service in Danzig under the Treaty of Versailles and subsequent conventions. These are surely issues of law, bearing so close a likeness to the issues of innumerable cases in the law reports that the most careful Schoolman could not well discriminate. Of course they had their genesis in political disputes, and their decision may have been influential in determining the course of political action. That is often true in our municipal law. What of McCulloch v. Maryland, Ableman v. Booth, the Dred Scott case, the Slaughter House case, the Civil Rights cases, Guinn v. United States, and hundreds of other cases that are writ large upon the pages of our history? Do they not smack of politics? Would our political annals read the same if these decisions had never been made? Is the elaboration of the due process clause a judicial function that is altogether untainted by political considerations? No profound knowledge of our history or constitutional law is necessary to answer these questions. Issues of law are not isolated phenomena bottled up in a vacuum, like the artificial designs of Geissler's tubes. They are a part of the white light of common day. They often come to the courts trailing clouds of politics, and their decision does not always clear the atmosphere. However, by and large, it is a gain. When, from the complex confusion of a bitter controversy, we can single out the legal issues and submit them to the relatively calm scrutiny of well trained judges, as the discrete colors are spread out by the prism for identification and measurement by the physicist, the result is usually to our advantage.

We know, then, this much—that there are seven courts in the United States and Canada which, for a number of years, have been bound to give advisory opinions on *any* question submitted by the proper authority in the proper way, that more than a hundred questions have been put to these courts, and that not one of them concerned a political issue. We know that of the thirteen references to the World Court for advisory opinions, all have dealt with issues that were strictly legal in character. We know, too, that the Council refrained from submitting at least one question for an advisory opinion, because a member objected on the ground that political as well as legal issues were involved. We remember that a single state represented at a meeting of the Council could prevent the reference of a question to the Court, because of the rule of unanimity provided in the Covenant. We remember, too, that Article 14 says the Court *may* give an advisory opinion, and that Article 74 of the Rules of Court says "any advisory opinion which *may* be given." But, says Senator Borah, it is in the nature of courts to reach for jurisdiction and power, and another court may be quick to seize an opportunity to voice its opinion on a political question. Such an assertion will ring strangely in the ears of those who have been brought up in the belief that one of the most important reasons for the adoption of the doctrine of a separation of governmental powers is found in the natural weakness of the judiciary and the necessity of protecting it from the encroachments of the other departments. To Hamilton it was incontestable that "the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks." The readiness of our State and federal courts to decline to exercise jurisdiction in hundreds of cases regularly brought before them, for the reason that "political" questions were involved, is hardly consistent with the allegation that they are eager to push their jurisdictional fences farther afield. Finally, we must take notice of the judicial reluctance to render advisory opinions at all unless the interrogator is clearly within his rights. Even under the broad provision of the Colorado constitution, the court went out of its way in refusing an opinion on one occasion, to declare that it was "clearly not authorized to give its advice upon any question of fact or of policy." The World Court has already established an exception to the unqualified "any dispute or question" of Article 14 of the Covenant, by refusing an opinion when the subject matter was in controversy between two states and one of them refused to consent to the Court's jurisdiction. In that opinion the principle is carefully enunciated that "the Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court." Can there be a reasonable doubt that it is beyond the realm of probability that the Court will so violently break with all judicial tradition and example as to forget that one of these essential rules is that questions of policy are not a proper subject for judicial inquiry?

Next we encounter the fear that the Court may be subjected to political pressure and controlled by political influences to such an extent that its pristine integrity and high judicial standards may be seriously impaired. How this control is to be applied is not specified, and it is by no means obvious. The League is the source of danger, it appears, because all will be well, "if the League will give it its independence after it is created." It is difficult to see how the League is to dominate and direct the World Court, even if we assume the desire to do so, as effectively as American legislatures could control our own courts if they were so moved. Consider the situation in the seven States where the advisory opinion is constitutionally recognized. In three of these the judges of the highest court are appointed by the governor and council, in one they are chosen by the legislature, and in the rest they are selected by the voters of the State. In all but one of these States their salary is fixed by the legislature. In one of them they may be removed by the governor upon the address of the legislature, and in another by the legislature alone, and they are liable to impeachment by the legislature in at least five of the seven commonwealths. It is not at all uncommon for the constitution to give the legislature some control over the jurisdiction and terms of court of the highest tribunal in the State. An estimate of the constitutional security of the Supreme Court of the United States might well give rise to some forebodings in the hearts of those who worship judicial independence. The President and Senate can "pack" it for political purposes or fail to fill vacancies at all. Congress can decimate it by the process of impeachment

or emasculate its appellate jurisdiction, and either house can bring it to an untimely end by refusing to consent to appropriate money for its expenses. The World Court is in no such precarious position. Its judges are elected by the Assembly and Council, it is true, but they must be chosen from a list of persons nominated by the national groups in the Hague Court of Arbitration, which is altogether independent of the League. The term of office is limited, but it would take many years to bring about the disappearance of the Court by neglecting to elect new justices, for those in office continue to discharge their duties until their places have been filled. The jurisdiction of the Court is carefully defined (except as to states not members of the League or mentioned in the Annex to the Covenant), and if there is a dispute as to its jurisdiction, the matter is settled by the decision of the Court. Regular sessions are within the control of the Court itself, except that there must be one every year; special sessions rest in the discretion of the President of the Court. All of these provisions are found in the "statute" to which the Court owes its existence, and this, it must not be forgotten, is not an enactment of the League of Nations, but a separate treaty, not dependent in the slightest degree upon the Covenant for its authority, and bearing its own distinctive list of signatory powers. There is, in fact, only one weapon of control which the League might conceivably use with any effectiveness against the Court, the financial one. Similarly, the legislature regulates judicial salaries in five of the seven States referred to above. Also, the expenses of the Court are borne by the League of Nations, and the Court might be annihilated by a denial of running expenses. The same misadventure is possible in any State in the Union and in the federal government. Again we must fall back upon the records of our political experience and the law of probabilities. How many times have the political controls which we have for 135 years entrusted to the legislative and executive departments been used to coerce and demoralize the third branch of the government? What is the probability of the effectiveness of the relatively small amount of political pressure that the League of Nations can exert upon a Court composed of "persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law," when that Court is functioning in the bright glare of world-wide publicity?

By exercising the advisory function, the argument proceeds, the Court has in effect become, to a marked extent, a legal department of the League. From the beginning, there has been a legal section of the Secretariat, to give legal advice to the Assembly, the Council and the Secretary-General, and in particular to act as an expert authority upon treaties and conventions. It corresponds to the attorney general who is found in each of our States. Has the League, then, two legal departments? Is the Supreme Judicial Court of Massachusetts a legal branch of the executive department because it gives advisory opinions to the governor and legislature? The phrase implies a subordination that does not in fact exist. An attorney general is the head of what we might call the department of justice. By constitution or by statute the duty is commonly devolved upon him of giving opinions to the governor, heads of departments, either house of the legislature, and in some States to administrative boards or legislative committees. The courts have usually held that anyone who acts upon what proves to be an erroneous opinion of the attorney general is not protected by that opinion from legal liability. This general right to have opinions from an official lawyer on a great variety of matters is in sharp contrast to the limited privilege accorded to, at most, the governor and either house of the legislature, to submit "important questions upon solemn occasions" to the highest court of the State. The court will often decline to answer, the attorney general hardly ever. The opinions of the latter have little authority behind them and will have no effect, as such, upon a court in a case involving the advisee; the advisory opinions of a court have no binding effect as precedents, it is true, but the advice has been followed almost without exception, because of the strong probability that the law has been correctly stated.

The gist of this objection is that there is danger that the political body will take advantage of the advisory privilege "to increase and add to the duties and responsibilities of the court." This apprehension finds no encouragement in the history of advisory opinions in the United States. Massachusetts has had this dangerous institution for 145 years, and in that time the privilege has been exercised 125 times. In New Hampshire there have been 51 opinions in 141 years, in Maine 62 opinions in 105 years, in Rhode Island 53 opinions in 83 years, in Florida 51 opinions in 57 years, in Colorado 94 opinions in 39 years, and in South Dakota 16 opinions in 36 years. Surely this record does not show a gross abuse of the consultative privilege. Nor is there any evidence to show that the judiciary in these seven States has become entangled in political affairs or has been burdened with undesired duties to any greater extent than the judiciary of the other States in the Union. What indication is there of a different attitude towards the World Court on the part of the League of Nations? Neither the League nor any of its organizations can become a party to proceedings before the Court. In the report of the Advisory Committee of Jurists which M. Bourgeois presented to the Council, which was adopted on October 27, 1920, it was emphasized that "the essential principle which must be safeguarded is that of the respective independence of the judicial powers represented by the Court and of the international power represented by the Council of the League of Nations." Has either the Council or Assembly shown any disposition to forget this principle? The Council has, in at least three instances, refused to ask the Court for an opinion desired by one of its members or by a member of the League; and in the Corfu affair it set up a special committee of jurists to consider questions that Lord Cecil wished to have submitted to the Court.

But a horrible example is at hand. The terms of the proposed Geneva Protocol show plainly enough that the Court is considered a subordinate body, at the beck and call of the League. Of course, the adoption of the Protocol is far from imminent, but let us waive that point and look at the argument on its merits. The jurisdiction of the Court is categorically fixed by Article 36 of the Statute. It comprises "all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." The League itself cannot extend this jurisdiction, for it has no power to amend the Statute. Neither can it elaborate it by new "matters specially provided for in treaties," for the League has no treaty-making power. Direct enlargement of the duties and responsibilities of the Court in a legal manner by the Council or Assembly, as such, does not seem possible. On the other hand, any two states in the world, even though not members of the

League, could in a sense enlarge the jurisdiction of the Court, by agreeing to submit certain matters for its decision. In fact this has been done rather extensively already. It is natural enough that those who accept the Court as a part of the new international order should turn to it as a convenient tribunal to deal with legal questions that might arise under a new treaty. There are numerous treaties that refer to the Hague Court of Arbitration as a matter of convenience, and, in a sense, "enlarge" its jurisdiction. The Geneva Protocol was not an enactment of the League, it was a proposed treaty. It could have become operative with the ratified signatures of thirteen states, and the jurisdiction of the Court would have been "enlarged" thereby. But this "enlargement," it must be particularly noted, would come as an elaboration of the jurisdiction conferred originally by Article 36 of the Statute, and is in no sense a result of the advisory function, which is a "matter specially provided for" in another treaty, namely the Covenant of the League of Nations. In reality, there is no "enlargement" of the duties of the Court by the provisions of the Geneva Protocol. Its adoption would bring into existence another treaty for the Court to interpret (certainly a proper judicial function), if it were involved in a controversy submitted to the Court. True, the Protocol requires arbitrators who act under it, in certain cases, to seek the opinion of the Court, but they must do so through the medium of the Council, and they could do the same thing now without any Protocol. The Protocol says nothing as to the duty of the Court to give an opinion; it is the arbitrators who "shall request" an opinion and "shall take . . . advice." Incidentally, the questions to be referred are specifically questions of law. In one instance it is provided that the Court "shall meet with the utmost possible dispatch," but it can hardly be supposed that the Court would recognize the obligation of such a clause unless incorporated in the Statute, and after all it only calls for such action as the Court would be disposed to take on its own initiative if the nature of the case demanded it. It is difficult to discern in such provisions any "overhauling" of the Court, or even any disposition to overhaul on the part of the League or its organs.

The argument closes with an expression of dissatisfaction because the advisory opinions given by the Court will not be binding. It seems somewhat inconsistent to complain about this feature and still hold that there is danger that political questions will be submitted to the Court. One would think it would be a distinct advantage not to have the Court bear the onus of making the final decision in cases charged with political dynamite. But let us assume, as we have tried to demonstrate, that it is extremely improbable that non-legal questions will be referred for the Court's advice. And let us examine the available evidence to see how strong is the probability that the Court's prestige will be impaired or its independence shaken by the Council's "over-riding" its advisory opinions. "Over-riding" is of course too strong a word. The opinions are avowedly proffered as advice which the interrogator is free to follow or reject as he chooses. What has been the practice? I quote conclusions expressed elsewhere by me, after a careful examination of the history of the advisory opinion in the United States. "In practice, in the United States, advisory opinions have been received, for the most part, with all the deference accorded to the solemn decisions of a court of last resort. Both the legislative department and the executive department have usually treated the pronouncements of these opinions as final, and shaped their course of action accordingly."[2] In fact, I have been unable to find a single case among the many opinions given by the courts in Massachusetts and Colorado, where the executive or legislature acted in opposition to the advice given by the justices. The opinions of the World Court have been received equally well by the Council, and there are most potent reasons why this should continue to be the case. The Statute practically assures a Court composed of able, honest and experienced international jurists, fairly representative of the various legal systems of the world. The Rules of the Court have surrounded the advisory opinion with as many safeguards as if it were an orthodox judicial proceeding. The inquiry is presented in writing and must be accompanied by all the relevant information the interrogator can supply. Notice of the request is immediately given to all the members of the League and to the states mentioned in the Annex to the Covenant and to any international organizations which might furnish helpful information. The practice in every case has been for the Court to receive briefs and hear arguments by representatives of any state or organization that might be affected by the advice. The opinion is given after deliberation by the full Court, is read publicly, is sent to the states and organizations that were notified originally, and is published by the Court itself. Why should these opinions not carry great weight? And why should an organ of the League, dealing with a difficult problem in which legal issues are involved, not be glad enough to fortify its decision as far as possible by the Court's authority rather than invite the severe criticism that would certainly follow the "over-riding" of the Court's opinion?

Senator Borah says he sees no difference between our sitting upon the Council of the League, dealing with questions of arbitration and the power of the League under the Covenant, and sitting upon the Court and giving advice upon these same matters. Of course, there is considerable difference between an opinion of the Court as to whether the Council, for example, has power under the Covenant to take certain action, and the decision of the Council as to whether it would be expedient to take that action if it has the power. But beyond that, the statement is rather misleading. By adhering to the Statute of the Court (with the Harding-Hughes-Coolidge reservations) we would in no sense acquire a "seat" in that tribunal. States are not members thereof or entitled to representatives thereon. An American is seated there now, but not as a representative of the United States, and he would certainly not receive any instructions from the Department of State of we "joined" the World Court. We would take part in the election of other judges, along with fifty-five other states, and we would help pay the general expenses of the Court. That would be the full extent of our participation, except in so far as we voluntarily submitted cases to the Court, a privilege which is ours already, as a state mentioned in the Annex to the covenant. In no sense and not in the slightest degree would we become "the adviser of the League and the adviser of every temporary arbitration committee dealing with all the affairs of Europe." Except for the greater prestige it would give the Court and the enlarged sense of self-respect it would give many Americans, it really makes little difference whether we adhere to the Statute in the near future or not; but if we are to stay away a while longer, let it be for some more tenable and substantial reason than the danger inherent in advisory opinions.

2. Departmental Cooperation in State Government, 154.

REVIEW OF RECENT SUPREME COURT DECISIONS

Interstate Commerce Commission and Reparation Orders—Limited Liability of Carriers—Validity of Act of March 8, 1922, Authorizing Condemnation of Certain Lands by Government—Federal Water Power Act—Oklahoma Statute Requiring Certain Employers to Pay "Current Rate of Wages" in Locality Held Void —"Future" Trading Act—The "Alien Seaman" Act—Graduated License Tax—Taxation of State Agencies

By Edgar Bronson Tolman

Carriers,—Interstate Commerce Commission, Reparation Orders

Consignors of goods sold f. o. b. destination, although the freight is actually paid by the consignee and there is a provision that the buyer shall be liable for or get the benefit of any rise or decline in the freight rate, may nevertheless maintain an action against the carrier to recover overcharges for transportation, where the amount paid for freight charges is credited on the purchase price of the goods.

Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co., Adv. Ops. 94, Sup. Ct. Rep. v. 46, p. 73.

The case decided in this opinion grew out of proceedings commenced April 16, 1912, by the company, a producer of pig-iron, to secure a reduction of tariff rates on that commodity shipped from its furnaces in Alabama over the petitioner railroad as initial carrier. The Interstate Commerce Commission, besides reducing the rates, entered an order finding that the rates had been excessive from a time two years before the company had filed the original complaint, and requiring the railroad to pay back to the company a sum which, with interest, exceeded one hundred thousand dollars. When the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment, the railroad brought the case to the Supreme Court, both on writ of error and by a petition for a writ of certiorari. The case being properly before the court on writ of error, the writ of certiorari was denied. Judgment was affirmed.

Mr. Justice Brandeis delivered the opinion of the Court. The seventy-seven errors formally assigned were by him reduced to seven contentions separately considered and disposed of. Any or all of these might have been expressed in the caption to this review; the point which is actually stated in the heading is the only one upon which certain members of the court felt constrained to express their dissent from the majority opinion.

Some of the petitioner's contentions went to matters of procedure, others to substantive rights. It was first argued that the final order of reparation was void because the railroad had had no notice or opportunity to be heard before it was entered. The learned Justice held, however, that he need not inquire into the question as to whether or not the final order added certain items to the list for which the railroad was held liable, because even if the second order was void the original order was before the Court and was sufficient to sustain the judgment appealed from. The next contention was that the order was void so far as it included damages on account of shipments made during the two years preceding the date when the original petition was filed, because the details of the statement of claims were not presented on that date and the special two-year statute of limitation had run against claims not so specified. But the learned Justice said:

> No statute or rule imposes upon the Commission procedure so exacting as to make fatal mere failure to present within the period of limitation the detail of a statement which under the procedure prevailing in courts of law may ordinarily be supplied by amendment or a bill of particulars.

In like manner he disposed of the contention that the shipper could not recover for overcharges made after the institution of the proceedings because such were not expressly included in the prayer for reparation:

> A reading of the prayer as seeking damages for losses suffered in the past through the exaction of existing rates, but not for losses which will result while the proceeding to reduce them is pending, would deny to the words used their natural meaning and impute to the complainant a strange eccentricity of desire. The action of the Commission was in harmony with its own long settled practice and with the practice of courts in analogous cases.

In deciding against the railroad on the fourth and fifth contentions, he held that the prayer for general relief was sufficient to justify an award of reparation for shipments over lines of connecting carriers, although the connecting carriers were not parties to the proceeding; and that the Louisville & Nashville was liable as to overcharges on joint rates, for as to such rates the liability of the connecting carriers is joint and several.

The sixth contention was that the shipper could not recover because it was not the injured party. It was shown that the sales contract declared the price to be based upon the existing tariff rate, and provided that the buyer should have the benefit of any decline in tariff, and should pay any advance. The railroad argued that because any reduction in rate would inure to the benefit of the buyer, no action could be maintained by the seller. But the learned Justice said:

> The construction urged ignores the commercial significance of selling at a delivered price. When a seller enters a competitive market with a standard article he must meet offerings from other sources. On goods sold f. o. b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. An excessive freight charge for delivery of the finished article affects him as directly as does a like charge upon his raw materials. Moreover, the burden of the published freight rate rested upon the

consignor under the bill of lading (citing case), as well as under the contract of sale. The purchaser who paid the freight did so solely as agent for the seller. The carrier did not know of the provision in the sales contracts. With the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them.

The final contention had to do with the award of interest.

Mr. Justice McReynolds delivered a separate opinion in which he declared his agreement with the dissenting view that had been expressed by one member of the Commission. Mr. Justice McReynolds' opinion concludes with these words:

It is vain to speculate whether the seller might have obtained better prices if the freight rate had been lower. It might not have gotten the business at all. Certainly it suffered no more than any competitor who failed to sell because of the exorbitant rate but sustained no proximate loss and therefore had no right to reparation. Every member of the public may be said to be damnified by excessive freight rates; but unless proximate damage exists there can be no recovery from the carrier. Here the consignee paid charges unlawfully demanded of it and is actually out of pocket more than it should be. The consignor paid nothing, lost nothing; but under the ruling below it alone may seek reparation—reparation for money unlawfully exacted of another.

The same general conclusion was expressed in the following succinct dissenting opinion of Mr. Justice Stone:

I dissent from the opinion of the majority of the Court on the ground that the consignees who paid the freight to procure goods, the title to which was in them when shipped, were within the protection of the statute prohibiting unreasonable freight rates, and upon payment of the illegally exacted freight from their own funds they were the persons suffering proximate damage and were therefore entitled to recover the excess freight within the meaning of the statute and the reasoning of the opinion in Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531.

The case was argued by Messrs. E. Perry Thomas and Charles J. Rixey for the railroad, and by Mr. Challen B. Ellis for the Company.

Carriers,—Limited Liability

A shipper is bound by the terms of a freight receipt limiting the carrier's liability for loss on goods for which a lower rate is paid; that the carrier knew that the shipper's agent was ignorant of the true value of the goods is immaterial.

American Railway Express Company v. *Daniel*, Adv. Ops. 14, Sup. Ct. Rep. v. 46, p. 14.

In a suit to recover damages for loss of goods sent by the Express Company verdict was found for one hundred dollars although the receipt declared the value of the goods sent to be only fifty dollars, and judgment entered thereon was affirmed by the Supreme Court of Georgia. The sender could have made the Company liable for the full value by paying a higher tariff, but the state court held for the shipper because the sending agent was not shown to have known that a lower valuation secured a lower rate, and the carrier knew that the agent was ignorant of the true value of the goods. On writ of certiorari, the Supreme Court reversed the judgment.

Mr. Justice Holmes delivered the opinion of the Court, and said:

The carrier's knowledge of the agent's ignorance of the value was immaterial. It acted in good faith. The carrier's schedules should have been admitted and bound both parties. (Citing cases.) The sender is bound to know the relation established by them between values and rates.

The case was argued for the Company by Messrs. Blair Foster, A. M. Hartung, H. S. Marx and Robert C. Alston.

Eminent Domain

A statute authorizing the condemnation of land upon which the United States, under lease, has constructed buildings, is not unconstitutional by virtue of the fact that it provides that the value of the government improvements shall not be considered in awarding damages.

Old Dominion Land Co. v. *United States*, Adv. Ops. 77, Sup. Ct. Rep. v. 46, p. 39.

During the War the United States erected buildings costing more than a million and a half dollars upon lands owned by the petitioner in Newport News, Virginia. The Government rented the land upon short term leases. When the owner refused to renew the lease, after the War, the Government brought this suit to acquire the land by condemnation. The proceedings were brought under a statute which made an exception to the general enactment stopping the purchase of land for military purposes, authorized the purchase of lands to carry out agreements by which the Government was already bound, and authorized the exercise of the right of eminent domain where an agreement could not be reached. Judgment for the Government was affirmed by the Circuit Court of Appeals for the Fourth Circuit, and, on writ of error, again by the Supreme Court.

Mr. Justice Holmes delivered the opinion of this Court. He first held that as the statute specially appropriated money to buy this particular site, it was immaterial that its general purpose was to complete the purchase of only those lands which the Government was already bound to purchase. He disposed of the attack upon the validity of the act in these words:

Then it is said that the Act of March 8, 1922, was unconstitutional by reason of the proviso that we have stated, excluding from the compensation improvements upon the land or in the vicinity thereof made by the United States. There might be cases in which this provision could not be sustained, but there is no trouble here. . . . When these proceedings were begun the buildings belonged to the United States. It would not be just to allow the delay necessary in legal proceedings to deprive the United States of rights that it had and endeavored by this suit to assert. (Citing case.) In the often quoted language of Chief Justice Shaw: "If a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." (Citing case.) It in no way appeared that the value of the land was increased by other improvements in the vicinity, or otherwise than by the structures upon the land so that the most indefensible aspects of the statute are not before us here.

Finally, the learned Justice refused to enquire into the possibility that the Secretary of War wished to buy the land not in order to make use of it in the future, but merely to save the buildings already built on it. He said:

Congress has declared the purpose to be a public use, by implication if not by express word. If we disregard the heading quoted from the latest Act, "Sites for military purposes," which we see no reason for doing, and treat "For quartermaster warehouses" as descriptive rather than prospective, still there is nothing shown in the intentions or transactions of subordinates that is sufficient to overcome the declaration by Congress of what it had in mind. Its decision is entitled to deference until it is

shown to involve an impossibility. But the military purposes mentioned at least may have been entertained and they clearly were for a public use.

The case was argued by Messrs. J. Winston Read and Thomas H. Willcox for the land company and by Assistant to the Attorney General, Blackburn Esterline for the United States.

Rights and Remedies,—Federal Water Power Act

Whether or not statutory provisions are unconstitutional may not be made the subject of judicial inquiry until these provisions are given or are about to be given some practical effect.

New Jersey v. *Sargent*, Adv. Ops. 177, Sup. Ct. Rep. v. 46, p. 122.

In this suit the state of New Jersey invoked the original jurisdiction of the Supreme Court in order to have the Federal Water Power Act of 1920 declared unconstitutional so far as it affected waters within or bordering upon that State. The Supreme Court, however, granted a motion to dismiss the bill because it concluded that the suit was an attempt to have the Act declared unconstitutional before the operation of the statute had actually threatened any right of the State. No controversy appropriate for the exercise of judicial power was presented by the allegations of the bill.

Mr. Justice Van Devanter delivered the opinion of the Court. The first half of his opinion is devoted to a review of those decisions, beginning with *Georgia* v. *Stanton*, wherein the Supreme Court refused its jurisdiction because the facts showed no controversy affecting rights as to person or property. He then said:

> On reading the present bill we are brought to the conclusion, first, that its real purpose is to obtain a judicial declaration that, in making certain parts of the Federal Water Power Act applicable to waters within and bordering on the State of New Jersey, Congress exceeded its own authority and encroached on that of the State, and secondly, that the bill does not show that any right of the State, which in itself is an appropriate subject of judicial cognizance, is being, or about to be, affected prejudicially by the application or enforcement of the Act. We think the reasons for this conclusion will be indicated sufficiently by describing the Act and then pointing out the distinctive features of the bill.

He reviewed the provisions of the Act, and made it clear that its leading object is the conservation of waters for the purposes of navigation. After defining the wide powers which Congress may exercise over navigable waters within the States, he continued:

> The bill is directed against many provisions of the Act, especially those requiring permits and licenses and subjecting licensees to various restrictions and conditions and those relating to projects for utilizing the waters in the development of power; and it directly alleges that they all go beyond the power of Congress and impinge on that of the State. Plainly these allegations do not suffice as a basis for invoking an exercise of judicial power.

The learned Justice pointed out that the allegations in the bills as to threatened injuries were all vague and indefinite; it was alleged that the State "intended" or "contemplated" availing itself of certain opportunities to develop water power in navigable streams, projects which would be hampered by the permit and license requirements of the Act. He continued:

> There is no showing that the State is now engaged or about to engage in any work or operations which the Act purports to prohibit or restrict, or that the defendants are interfering or about to interfere with any work or operations in which the State is engaged. If the use of particular waters in connection with the Morris Canal or with any reservoirs and water works, before the Act was passed, gave rise, as the bill suggests, to a right to continue such use, the Act does not purport to disturb, but rather to recognize, that right; and there is no showing that the defendants are taking or about to take any steps to prevent the State from exercising it. Passing that right, the State is merely shown to be contemplating power development and water conservation in the future. There is no showing that it has determined on or is about to proceed with any definite project.

Whether or not these restrictions are invalid as invading the field of power reserved to the States, he said such restrictions

> cannot be made the subject of judicial inquiry until they are given or are about to be given some practical application and effect. Naturally this will be after they become part of an accepted license, and after some right, privilege, immunity or duty asserted under them becomes the subject of actual controversy. Such a situation is not presented here. As respects the State's submerged lands, the bill signally fails to disclose any existing controversy within the range of the judicial power. Stating merely that the State will be deprived of revenue from the leasing of such lands is not enough. Facts must be stated showing that the Act is being or about to be applied in a way which does or will encroach on or prejudicially affect the State's qualified right in the lands. There is no such showing.

Case argued by Attorney General of N. J., Thomas F. McCran and Messrs. William Newcorn and Harry R. Coulomb for complainant and by Solicitor General Beck and Special Assistant to the U. S. Attorney General, Robert P. Reeder, for defendants.

Statutes,—Certainty of Terms, Criterion of Guilt

The Oklahoma statute requiring employers doing work for the State to pay employees not less than the current rate of wages at that locality is void for failure to fix any ascertainable standard of guilt.

Connally et al. v. *General Construction Company*, Adv. Ops. 163, Sup. Ct. Rep. v. 46, p. 126.

In 1921 Oklahoma enacted a statute establishing an eight-hour day for all persons employed by or on behalf of the State and requiring such employes to be paid "not less than the current rate of per diem wages in the locality where the work is performed." Under a contract with the State, the Company was building certain bridges near Cleveland, Oklahoma. The state Commissioner of Labor complained of the Company that it was paying its laborers only $3.20 a day, whereas the current rate near Cleveland was $3.60 a day, and served notice that he would enforce the law against the Company. The Commissioner's investigation showed that some employers in that neighborhood were paying as low as $3.00 a day but that most were paying $3.60 or $4.00. The Company brought this suit in the District Court for the Western District of Oklahoma to enjoin the state authorities from enforcing the statute against it by possible fine or imprisonment. A court of three judges granted an interlocutory injunction. Upon appeal, the Supreme Court affirmed this decree.

Mr. Justice Sutherland delivered the opinion of the Court. After stating the facts, reviewing pertinent cases, and declaring the general principle of law as to the degree of certainty required of statutes, and particularly of penal and criminal statutes, he said:

> We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not

denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction. The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The "current rate of wages" is not simple but progressive—from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. (Citing case.)

Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations. To construe the phrase "current rate of wages" as meaning either the lowest rate or the highest rate or any intermediate rate or, if it were possible to determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the legislature as to promote it.

With regard to the second fatal uncertainty he said, in part:

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. . . . And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

Mr. Justice Holmes and Mr. Justice Brandeis concurred in the result on the ground that "the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland."

Argued by Attorney General George F. Short of Oklahoma and J. Berry King for appellants and by J. D. Lydick for appellee.

Statutes,—The "Future Trading Act"

Section 3 of the Future Trading Act, imposing an excise tax upon options for contracts for the sale of grain, was not intended to produce revenue but to prohibit all such contracts and hence cannot be sustained as a valid exercise of the taxing power.

Trusler v. *Crooks et al.* Adv. Ops. 198, Sup. Ct. Rep. v. 46, p. 165.

In *Hill* v. *Wallace*, 259 U. S. 44, the Supreme Court held invalid the principal sections of the Future Trading Act of 1921. The provisions held unconstitutional were those regulating sales of grain for future delivery. In the opinion of the Court reference was made to certain other sections of the Act, and it was stated that as to these the conclusions of the Court did not necessarily apply. Section 3 of the Act was one of those not then expressly declared invalid. This section imposed a tax of twenty cents per bushel upon every privilege or option for a contract either of purchase or of sale of grain, including "privileges," "bills," "offers," and "indemnities." The present case was brought to test the validity of section 3, and was tried upon an agreed statement of facts. Plaintiff brought suit to recover a tax imposed under this section upon a privilege or option for a contract for the sale of grain, and paid under protest. The District Court for the Western District of Missouri entered judgment for the taxpayer, but, on writ of error, the Supreme Court held Section 3 invalid and reversed the judgment.

Mr. Justice McReynolds delivered the opinion of the Court. Following his statement of the facts, the opinion concludes with the following paragraphs:

The stipulated facts reveal the cost, terms and use of "indemnity" contracts together with their relation to boards of trade and indicate quite plainly that Section 3 was not intended to produce revenue but to prohibit all such contracts as part of the prescribed regulatory plan. The major part of this plan was condemned in Hill v. Wallace and Section 3, being a mere feature without separate purpose, must share the invalidity of the whole. (Citing case.)

This conclusion seems inevitable when consideration is given to the title of the Act, the price usually paid for such options, the size of the prescribed tax (20 cents per bushel), the practical inhibition of all transactions within the terms of Section 3, the consequent impossibility of raising any revenue thereby, and the intimate relation of that section to the unlawful scheme for regulation under guise of taxation. The imposition is a penalty, and in no proper sense a tax.

Argued by E. R. Morrison for plaintiff in error and by Solicitor General Mitchell and Special Assistant to the Attorney General, Robert P. Reeder, for defendant in error.

Statutes—The "Alien Seamen" Act

The Federal statute providing for hospital treatment of alien seamen at the expense of the vessel that brought them to this country includes aliens on American vessels.

The owner of the vessel is not deprived of his property without due process of law by being required to bear the expense of such treatment of aliens by it brought into this country.

United States v. *New York & Cuba Mail Steamship Co.*, Adv. Ops. 122, Sup. Ct. Rep. v. 46, p. 114.

A Federal enactment of 1920 requires alien seamen brought into this country and found to be suffering from certain communicable diseases, specified in the Immigration Act of 1917, to be removed to a hospital for treatment. The owner of the vessel that brought such a seaman is required to bear the expense of such treatment, or, if the disease does not yield readily to treatment, the expense of returning the seaman to the country from which he came. When the steamship company involved in the present case refused to pay the hospital expenses of a Chilean seaman which its ship had brought to New York, the United States brought suit for the amount of these expenses. The Circuit Court of Appeals for the Second Circuit reversed judgment entered for the Government, on the ground that the Act applied only to foreign ves-

sels. On writ of certiorari, the Supreme Court in turn reversed the Court of Appeals.

Mr. Justice Sanford delivered the opinion of the Court. On this first question, as to the construction of the statute, he said in part:

> We think the term "alien seamen" is not to be construed as meaning seamen on foreign vessels. The general principle that an alien while a seaman on an American vessel is regarded as being an American seaman in such sense that he is under the protection and subject to the laws of the United States (Citing case) has no application to the question whether aliens employed on American vessels are included within the terms of a special statute dealing solely and specifically with "alien seamen," as such. And if the rule attributing to a seaman the nationality of the vessel should be applied to this act so as to give the term "alien seamen" the meaning of "seamen on foreign vessels," it would result, under the terms of its last clause, that an American seaman employed on a foreign vessel who was afflicted with an incurable disease, on being brought into an American port could not be admitted into the United States, but would have to be returned; an anomalous result which, obviously, Congress did not intend.

This conclusion was borne out by the history of the Act in question: it had been enacted to remedy certain deficiencies in the Immigration Act of 1917, which clearly legislated with regard to aliens employed on "any vessel" arriving in the United States from a foreign port.

That the Act so construed was constitutional the learned Justice had no hesitation in concluding. He said:

> This contention is without merit. The power of Congress to forbid aliens and classes of aliens from coming within the borders of the United States is unquestionable. (Citing cases.) Congress may exercise this power by legislation aimed at the vessels bringing in excluded aliens, as by penalizing a vessel bringing in alien immigrants afflicted with diseases which might have been detected at the time of foreign embarkation (Citing case), or by requiring a vessel bringing in aliens found to be within an excluded class, to bear the expense of maintaining them while on land and of returning them (Citing cases). There is no suggestion in any of these cases that this power is limited to foreign vessels. It may be exercised in reference to alien seamen as well as other aliens. And if they are found to be diseased when brought into an American port, the vessel, whether American or foreign, may lawfully be required to bear the expenses of their medical treatment.

The case was argued by Assistant Attorney General Ira Lloyd Letts for the United States, and by Mr. Mark W. Macley for the Company.

Taxation,—Federal Income Tax, Taxation of State Agencies

Income received as compensation for services rendered as consulting engineers under special contracts with states or municipalities is not exempt from Federal income tax.

Metcalf et al. v. *Mitchell*, Adv. Ops. 185, Sup. Ct. Rep. v. 46, p. 172.

This decision disposed of two appeals originating from the same suit; it is here necessary to state the facts as applicable to only one. Metcalf and Eddy were consulting engineers who were professionally employed to advise states or subdivisions of states with reference to contemplated water or sewage disposal systems. They paid under protest Federal income tax upon fees which they had received for such work during 1917, and then brought suit to recover the amount paid. The fees were received in every instance for services rendered under contracts made with a municipality or state or water supply district in connection with some special construction project, although in some cases their remuneration was paid not in a lump sum at the conclusion of the work, but in daily, monthly or even annual amounts. Their first contention was that these fees were expressly exempted from the tax by that section excepting compensation of "officers and employes under the United States, or any State . . . or any subdivision thereof." In the second place, they argued that Congress had no power under the Constitution to tax the income in question. The District Court for the District of Massachusetts entered judgment for the collector of Internal Revenue, and Metcalf and Eddy brought the case on writ of error to the Supreme Court, where judgment was affirmed.

Mr. Justice Stone delivered the opinion of the Court. He felt no uncertainty in deciding that Metcalf and Eddy were not "officers" of the State. On this point he said:

> We think it clear that neither of the plaintiffs in error occupied any official position in any of the undertakings to which their writ of error in No. 183 relates. They took no oath of office; they were free to accept any other concurrent employment; none of their engagements was for work of a permanent or continuous character; some were of brief duration and some from year to year, others for the duration of the particular work undertaken. Their duties were prescribed by their contracts and it does not appear to what extent, if at all, they were defined or prescribed by statute. We therefore conclude that plaintiffs in error have failed to sustain the burden cast upon them of establishing that they were officers of a state or a subdivision of a state within the exception of Section 201 (a).
>
> An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its terms, its duties and its compensation. (Citing cases.) The term "officer" is one inseparably connected with an office; but there was no office of sewage or water supply expert or sanitary engineer, to which either of the plaintiffs was appointed. The contracts with them, although entered into by authority of law and prescribing their duties, could not operate to create an office or give to plaintiffs the status of officers.

Similarly, it was clear that plaintiffs were not "employes" under the statute, but rather independent contractors.

Coming to the question whether the tax was invalid as falling within the prohibition of the Federal taxation of state instrumentalities, he said first:

> Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other.

He cited many cases where instrumentalities of the State had been held to be immune from Federal taxation, and then cases where some persons merely deriving profits from dealings with the State had been held subject to Federal taxation. In attempting to decide a case lying between the two extremes, he re-stated the reason upon which the rule rests:

> Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other.

The degree of intimacy with the state government of the agency sought to be taxed, he declared was a relevant factor. Thus, he continued:

> It is on this principle that, as we have seen, any taxation by one government of the salary of an officer

of the other, or the public securities of the other, an agency created and controlled by the other, exclusively to enable it to perform a governmental function (Gillespie v. Oklahoma, supra), is prohibited. But here the tax is imposed on the income of one who is neither an officer nor an employe of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way.

In conclusion he said:

We do not suggest that there may not be interferences with such a contract relationship by means other than taxation which are prohibited. . . . Nor are we to be understood as laying down any rule that taxation might not affect agencies of this character in such a manner as directly to interfere with the functions of government and thus be held to be void. (Citing cases.)

But we do decide that one who is not an officer or employe of a state, does not establish exemption from federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state; and when we take the next step necessary to a complete disposition of the question, and inquire into the effect of the particular tax, on the functioning of the state government, we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligations to the state or the ability of a state or its subdivisions to procure the services of private individuals to aid them in their undertakings.

Argued by Philip Nichols for Leonard Metcalf et al, and by Assistant Attorney General Ira Lloyd Letts for Maria E. Mitchell.

Bankruptcy

The court may of its own motion refuse a discharge in bankruptcy where an earlier application for discharge is still pending.

Freshman v. Atkins, Adv. Ops. 61, Sup. Ct. Rep. v. 46, p. 41. 6 Am. B. R. (N. S.) 744.

Freshman filed a voluntary petition in bankruptcy, and within the proper time applied for his discharge. This was contested, and the referee recommended the discharge be not granted. Before this recommendation had been acted on by the court—no interested party having brought it up—Freshman filed a second petition in bankruptcy and again applied for his discharge. The court upon its own initiative denied the second application as to creditors included on the first petition, and then, by separate order, denied the first application. The Circuit Court of Appeals affirmed the order denying in part the second application, and, on writ of certiorari, the Supreme Court affirmed this judgment.

Mr. Justice Sutherland delivered the opinion of the Court. The core of his opinion is as follows:

Here there was no plea or objection by any interested party, and it is argued that this is a necessary prerequisite to a consideration of the matter—that the court may not refuse a discharge *ex mero motu*. That such is the rule where the action of the court is based upon one or more of the acts of the bankrupt which operate to preclude a discharge may be conceded. But the objection that the issue is already pending, as that it has been adjudged, goes to the right of the bankrupt to maintain the later application, not to the question of the evidence or grounds upon which the relief may be granted if the application be maintainable. The refusal to discharge was not on the merits but upon the procedural ground that the matter could not properly be considered or adjudged except upon the prior application. This application had been reported upon adversely by the referee, was still pending, and, in ordinary course, could have been considered and acted upon by the court. To ignore it and make a second application, involving a new hearing, was an imposition upon and an abuse of the process of the court, if not a clear effort to circumvent the statute by enlarging the statutory limitation of time within which an application for a dischcarge must be made. In such a situation the court may well act of its own motion to suppress an attempt to overreach the due and orderly administration of justice.

Argued by Mr. Paul Carrington for petitioner.

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Among Recent Books

HUMANISM and Tyranny: Studies in the Italian Trecento. By Ephraim Emerton, Winn Professor of Ecclesiastical History in Harvard University (Emeritus). Cambridge, Harvard University Press, 1925. $4.00. In this slender volume our best known American scholar in the field of the Italian Renaissance has collected a number of admirable studies dealing, on the one hand, with the intellectual movement called humanism and, on the other, with the political disturbances in Italian society which gave rise to the phenomenon of the tyrant. Presumably only the latter studies, which constitute, however, about three-fourths of the volume, will have an appeal for the professional students of law. They involve an examination into the situation created by the need of the urbanized society of the fourteenth century to erect for itself a really adequate government in place of the loose personal relations called feudalism which served the simple pur-

poses of an earlier, purely agrarian age. It is well known what happened in consequence of this social-economic revolution: the expanding towns, driving out the feudal lords, experimented with a system of self-government, and when that went to pieces on the rocks of incurable local divisions, had recourse to the man on horseback, the dictator, for that is what the tyrant was. Strikingly and justly the author points to Mussolini as a twentieth century variant of the fourteenth century species and at the same time makes clear that *il duce's* emergence is referable to a similar uncertainty of social and political relations in the Italy of our day.

Much of the pungent flavor of these studies arises from the fact that they have as their core and center excellent English versions of treatises on the contemporary movement toward tyranny first, by a great legal scholar, Bartolus of Sassoferrato, and second, by a very famous humanist, Coluccio Salutati. Both were manifestly disconcerted by the spectacle of the usurpers swinging themselves into the saddle all about them. They tried to ease their troubled mind by searching for a valid legal sanction for the tyrant, and failing that, a moral or metaphysical one. Legally, they are agreed, the tyrant was and would remain an outlaw unless he could somehow gain the endorsement of a superior and ultimately of the Roman emperor himself, the embodiment of the civil order of the universe. So masterfully did the Roman law have these Italian descendants of Rome by the throat. However, in case the traditional sanction was for one reason or another unobtainable, our two worthies incline to the view that if the tyrant will only serve the good of the people he will in the due course of time cease to be a tyrant and become fully legitimate. This alternative legitimization is interesting because it represents a rather startling victory for common sense and pretty much squares with all the various democratic theories of government which have been propounded, and often enough in much more painfully abstruse language than in the present instance, from the far age of Aristotle to our own day. Translations of evidence regarding the vigor and violence of a typical tyrant who lorded it over the city of Forli and an English version of the famous ordinances of Cardinal Albornoz, who turned out a score of little tyrants in order to set up the pope in their place, conclude the political features of this lively little volume.

FERDINAND SCHEVILL.

University of Chicago.

Our Federal Republic, by Harry Pratt Judson. New York: The Macmillan Co., 1925. Pp. 277. $3.00.

A Scrap Book on Constitutional Government, by J. J. Mayfield. Atlanta: Foote and Davies Co., 1925. Pp. 572. $5.00.

The former president of the University of Chicago discusses the drift towards centralization, both by amendments to the Constitution and legislation, which he believes has gone as far as to overbalance the federal equilibrium and endanger the vital principle of the republic—the principle of large local freedom from central control. There are chapters on the federal equilibrium, the federal bill of rights, the Supreme Court as the guarantors of such rights, the later amendments to the Constitution, an analysis of the 98 amendments proposed in the 68th Congress, legislation for military pensions and federal control of education, and the need for a new policy.

President Judson approves the balance of power as established in the original constitution, with the limitations on the central government in the first ten amendments, and he accepts the thirteenth and fourteenth amendments. But he disapproves of all the later amendments, and proposes their repeal; and urges that we have gone far enough in the direction of a centralized bureaucracy in Washington.

A good many will agree with his general attitude, which is reflected in other discussions at the present time. But even among those who object to some of the centralizing tendencies, there will be questions as to the inarticulate major premise that a perfect balance was reached with the adoption of the fourteenth amendment. Some, too, will ask why that amendment, with its serious limitations on the powers of the states, is not included as an important factor in the centralizing movement?

The assumption of an ideal and eternal balance of political power ignores the influence of economic and social forces; and there is no hint of the centralizing movement in business, or in such matters as university education, outside of the field of political action. To no little extent political centralization has been due to, and in some respects still lags behind, that in other fields.

Attention might well have been given to more positive proposals for meeting the dangers of overcentralization. Elihu Root's appeal for greater activity by the states is one method. Another suggestion is a more definite policy of decentralizing the administration of national laws, as the scope of national legislation expands.

The general character of the volume by Judge Mayfield, code commissioner of Alabama, is indicated by the title. It is a compilation of documents and extracts from judicial opinions and books on a variety of topics related to American government. These are grouped under different headings, beginning with Magna Charta and ending with state government. There is no table of contents, but an index helps its usefulness as a work of reference.

JOHN A. FAIRLIE.

University of Illinois.

Famous American Jury Speeches by Frederick C. Hicks. St. Paul. West Publishing Co. Pp. 1181. $5.00. Probably the usual reaction on first opening this book will be a slight feeling of bewilderment, as the title seems so little adapted to the contents. Of its three adjectives only one is really lived up to. All the speeches are American. Only a bare majority, thirteen out of twenty-four, were addressed to juries, the others being simply to courts of various natures, and some not even in court proceedings at all (such as the Hillquit speech in the New York Assembly's investigation of its Socialist members). To those who look on jury speaking as a special and distinct type of oratory this will seem a more important matter than it will to those to whom speeches are speeches. Nor can all of the selections be called famous, however deserving of note they may be. A few indeed are at best decidedly unknown gems. From all this one thing at least will already be apparent—the breadth of the field from which these particular twenty-four were selected. Given the wide reading of its compiler, the law librarian of Columbia University, the result is likely to be a rather interesting one.

The West Publishing Company have now published volume 2 of the *Cases on Equity*, by Walter W. Cook, of the Yale School faculty. Its price is $5.00. (Pp. 900). Volume 1 and 3 appeared separately some months ago. The present volume deals

with specific performance and matters collateral to it. The effort (already noted for the other volumes) is continued here, to present its subject not so much in its historical continuity as in its business, or functional, setting. Another new case book from the same source is *Cases on Trusts* by G. P. Costigan, of the University of California. (Pp. 997. $5.50.) The latter's case book on Wills has long been a leader in its field and the present volume contains many of its characteristics, most noteworthy being the extended footnotes with their numerous references not only to cases but also to text and law review discussions. While these two case books are for use in law schools the West Co. is at the same time producing *Cases on Business Law* (Pp. 1024. $5.00) by R. S. Bauer and E. R. Dillavou for use in schools of business and commerce. The demand there not being so much for intensive as for extensive legal training, this volume covers a mass of subjects of great diversity, of which insurance, bailments, bankruptcy, and carriers are random examples. Interesting is the grouping under the head of "Security Rights in Rem" of such functionally united but legally divergent topics as conditional sales, chattel mortgages, collateral pledges, etc.

Matthew Bender & Co. are publishing in compact form, in a volume of some 550 pages ($3.00) the statutes of New York State of greatest general interest, as they stood at the close of the legislative session of 1925. Typical of those included are the Decedent Estates Law, Negotiable Instruments Law, and Partnership Law. The new Corporation Law of 1923 is not among the number, being of such importance as to have given rise to a separate manual.

Through the Johns Hopkins Press, Baltimore, the Institute for Government Research is continuing its series of monographs, each descriptive of some particular branch of the federal government. The latest additions are *The Children's Bureau* by James A. Tobey (Pp. 83. $1.00); *The Government Printing Office* by Laurence F. Schmeckebier (Pp. 143. $1.00); and *The Bureau of Standards* by Gustavus A. Weber (Pp. 299. $2.00).

Just before going to press the 1926 volume of Montgomery on *Income Tax Procedure* (Pp. 1995. $12.00) was received. Because of the high seasonal interest in this book it seems more desirable to insert a brief descriptive notice at once rather than to delay matters by the more extended review to which it would otherwise be entitled. With the exception of the addition of over 100 pages dealing with the new subject of the Board of Tax Appeals there is only one major structural change from the 1925 edition. This consists in the elimination of everything concerning the Excess Profits, Estate, Gift and Capital Stock Taxes, all of which are to form the subject matter of an entirely separate volume which will appear shortly. As would be expected in a work kept up to date, there are very numerous minor textual changes and additions. Somewhat more important is the gathering together into a new chapter of matter dealing with income from estates and trusts, a subject of frequent interest but not so readily got at in the old as it might have been and as it seems now to be. Plainly the work as a whole continues to deserve the favorable comment already made on past editions.

E. W. PUTTKAMMER.

Leading Articles in Law Reviews

HARVARD Law Review, January (Cambridge, Mass.)—Taxation of No Par Value Stock, by C. W. Wickersham; Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality, by Francis H. Bohlen; The Business of the Supreme Court of the United States—A Study in the Federal Judicial System, III. From the Circuit Courts of Appeals Act to the Judicial Code, by Felix Frankfurter.

California Law Review, January (Berkeley, Cal.)—The Legal Status of the California Indian, by Chauncey Shafter Goodrich; The Corporate Securities Act, Recent Cases and Amendments, by Lionel B. Benas.

Illinois Law Review, January (31 W. Lake St., Chicago).—Tasks of the American Lawyer, by Roscoe Pound; Control Over Federal Funds, by O. R. McGuire; Work of the Sixth Assembly of the League of Nations, by John H. Wigmore.

The Canadian Bar Review, January (145 Adelaide St., W. Toronto).—Le Barreau de Paris, by Manuel Fourcade; The Inns of Court, by The Hon. Geoffrey Lawrence, K. C.; On the Frontier, by A. B. Hogg; International Notes, by Norman MacKenzie; Some Aspects of Treaty Legislation, by A. W. Rogers.

University of Pennsylvania Law Review, January (34th and Chestnut Sts., Phila.).—Assignment of Contract Rights, by Arthur L. Corbin; Pennsylvania Rule as to Admissibility of Evidence to Establish Contemporaneous Inducing Promises to Affect Written Instruments, by Earl G. Harrison; The Common Law and our Federal Jurisprudence (II), by Robert von Moschzisker.

Michigan Law Review, January (Ann Arbor, Mich.).—The Power of the Written Assertion, by Gustavus Ohlinger; Going Value, by William W. Potter; Canada's Treaty Making Power, by C. D. Allin.

Virginia Law Review, January (University, Va.).—Double Taxation, by Cornelius W. Wickersham; A Definition of Law, by Hugh Evander Willis; The International Liquor Treaties and the Eighteenth Amendment, by James B. McDonough.

Wisconsin Law Review, January—(Univ. of Wis., Madison, Wis.).—Consideration and Value in Negotiable Instruments, by John D. Wickhem.

The Lawyer and Banker, January-February (711 Hammond Bldg., Detroit, Mich.).)—The Abuse of Law, by Young B. Smith; Time for Recording Title Instruments, by F. C. Hackman; Civil Liability Under the Volstead Law, by H. E. Foster.

Marquette Law Review, February (Milwaukee, Wis.).—Specific Performance of Contracts for Delivery of Personal Property, by William J. Morgan; Elementary Principles of Chattel Mortgages, by John McDill Fox; The Home Rule Amendment, by Dean Max Schoetz, Jr.; Reimbursement of Husband for Funeral Expense Out of Separate Estate of Deceased

Wife, by Joseph Witmer; The Futility of Requesting Inflated Damages, by Judge C. M. Davison; Taxation as Applied to Forest Properties and Cut-Over Land, by George Banzhaf.

Boston University Law Review, January (11 Ashburton Place, Boston).—Masters in Equity Suits (Continued) by Henry E. Bellew.

Journal of the American Judicature Society, December, (31 W. Lake St., Chicago).—Washington Creates Judicial Council—Text of New Act; Judicial Council Idea Ably Presented, Report Read at Meeting of North Dakota Bar Association by Judge A. G. Burr; National Meeting on State Bar Organization; Significance of Arbitration in the Motion Picture Industry, by Courtland Smith; First Aid for Trial by Jury, by John H. Wigmore.

Indiana Law Journal, January (217 State House, Indianapolis, Ind.).—Effect of an Unconstitutional Statute, Oliver P. Field; Some Fundamental Legal Concepts, Hugh Evander Willis.

WOMEN SHOULD HAVE EQUAL RIGHTS WITH MEN: A REPLY*

By BURNITA SHELTON MATTHEWS
Of the District of Columbia Bar

IN an article in the October issue of the American Bar Association Journal, Edward Clark Lukens, of the Philadelphia Bar, states that the Woman's Party is proposing an amendment to the National Constitution providing that "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction," and that it is amazing to find women thus seeking to end the "privileges" and "protection" of their sex.

The labor laws imposing restrictions upon woman's right to work, but not upon man's right, are foremost among the so-called "privileges" and "protection" which Mr. Lukens would have preserved. Under the Equal Rights Amendment, all labor enactments would have to be upon a non-sex basis. In other words, protective legislation applying exclusively to women would be prohibited. For this reason, Mr. Lukens finds the amendment objectionable, and many women, for the same reason, find it acceptable.

The Woman's Party believes that if labor legislation is desirable, or necessary, it should be enacted for all workers irrespective of sex. Protective legislation that includes women, but exempts men, handicaps women's economic advancement. It limits the woman worker's scope of activity and increases that of the man by barring her from certain occupations, by excluding her from employments at night, and by "protecting" her to such an extent as to render her ineffective as a competitor. Moreover, to restrict the conditions of women's work, and not those of men, fortifies the harmful assumption that to labor for pay is primarily the prerogative of the male, and that women are a class apart who are only allowed to engage in paid work at special hours, under special supervision, and subject to special governmental regulations.

When there is an examination one by one of each of the "privileges" women are supposed to enjoy, it is found that in practically every case it is really the man, not the woman, who is protected. Take an instance from Wisconsin. Several years ago that state gave to women "the same rights and privileges under the law as men," except that they were not to be denied "the special protection and privileges" which they then enjoyed "for the general welfare."[1] Of course, it was supposed that by the passage of this law, women were eligible for employment by the legislature, and that an old statute limiting legislative employees to men had been superseded.[2] But the positions were not opened to women. The ruling was that the "legislative service necessitates work during very long and often unseasonable hours," and that it is for the special protection of women to be excluded from such service.[3] So women still retain the "privilege" of having all positions under the Wisconsin legislature closed to them, and open only to men.

And if another instance is needed, witness the women employees of the New York Transportation companies who lost the actual protection of well-paid jobs when the legislature in 1919 imposed upon them the theoretical protection of a labor law for women only.[4] It will be remembered that this law limited the working day of women employed as ticket agents, guards and conductors, to nine hours, and prohibited night work between 10 p. m. and 6 a. m. At the request of the Industrial Commission, an examination of the books of the transportation companies in Greater New York was made to show how nearly the new law was in harmony with women's employment at the time the law was passed. What this examination really revealed was that 83 per cent of the employments of women were not in accord with the new statute.[5] Nor could adjustments to the law be made. For example, the women could not take any of the night shifts, and hence could not conform to the established seniority rule whereby those employees who had been the longest in the service had the preference in shifts and easy runs. The Brooklyn Rapid Transit discharged more than 300 women. The New York Railways Company dropped 203. These eliminations are typical of those of other companies. Yet the women and their employers were very anxious that they retain their positions. More than

*Reply to the article "Shall Women Throw Away Their Privileges?" by Edward Clark Lukens, in the October, 1925, issue of the American Bar Association Journal.

1. Wis. Laws of 1921, Ch. 529.
2. Wis. Laws of 1917, Ch. 634, Sec. 14.
3. Ops. Wis. Atty. Gen., Vol. 12, p. 13.
4. N. Y. Laws of 1919, Ch. 583.
5. Protective Labor Legislation, by E. F. Baker, Columbia University Studies in Political Science, Vol. 116, No. 2, pp. 371-389.

half of the women were supporting children or other dependents. The work was much easier than domestic service, and the hours fewer and more regular. The rate of pay was higher. The health of the women was improved. Notwithstanding this, the "protection" of the law ousted the women from their jobs. Men, many of whom opposed the employment of women in the transportation service, were in reality the law's beneficiaries. Fortunately, the statute in question was later modified.[6]

Since women must compete with men, the field is fair only when men and women are on a footing of equality in all protective measures. A large number of states already have labor legislation that applies to **all workers** engaged in a particular occupation. For example, Florida has a law providing seats for both men and women employed in mercantile or other business pursuits.[7] In Georgia, a 10 hour day in cotton or woolen manufacturing establishments is prescribed for the workers,[8] men and women alike, and the Oregon 10 hour statute for persons in mills and factories has been upheld by the Supreme Court of the United States as a valid health regulation.[9] It is true that there are no minimum wage laws applicable to men, but it is to be expected that there will soon be none for women, as the courts are declaring them invalid because contrary to the Constitution of the United States.[10]

In the old countries that take first place as to progress in the cause of women's freedom, the major organizations of women are unalterably opposed to a differentiation in labor legislation based on sex. This is because they know it works to woman's disadvantage, particularly in times of unemployment when work is scarce. In the United States, the Woman's Party and various branches of the Business and Professional Women's Club are among the more important organized groups taking this position. It is a significant fact that the rank and file of working women in this country appearing at hearings to object to proposed protective legislation for their sex is ever on the increase, and ever more articulate.

It is asserted by Mr. Lukens that "most of the states have laws either making it a penal offense for a man to desert and fail to support his wife and children, or enabling the court to compel such a husband or father to make periodical payments for their support," and that this legislation would be adversely affected by the application of the equal rights principle. The majority of the states having penal non-support enactments already make it an offense for the mother as well as for the father to desert and neglect to maintain their children. For instance, the Massachusetts statute states that " . . . Any parent, whether father or mother, who deserts or wilfully neglects or refuses to provide for the support . . . of his or her child under the age of sixteen, . . . shall be punished by a fine . . . or by imprisonment. . . "[11] The trend of legislation for years has been toward imposing the responsibility of maintenance upon both spouses. In many jurisdictions, husband and wife mutually owe each other support,[12] the wife is civilly liable for family expenses[13] which sometime may include even a diamond stud for the husband,[14] and alimony is payable by a woman or a man.[15] The court considers the ability and necessities of the parties and makes award accordingly. In New Hampshire, a woman who deserts her husband may be imprisoned six months, or fined $20, the fine to be applied for the benefit of the deserted husband in case the court so decrees.[16] In general, it is only when the wife is in destitute and necessitous circumstances and the husband has an earning capacity or is a property owner that the penal non-support laws have application. Where the husband is in destitute and necessitous circumstances and the wife has an earning capacity or is a property owner, she ought to be criminally liable for his support. The amendment would merely mean the complete carrying out of the equal rights doctrine that is now so far under way in the support laws of this country.

"In Pennsylvania," says Mr. Lukens, "we have a 'Mother's Assistance Fund Act,' providing for monthly payments by the state to poor and dependent mothers under certain circumstances, especially where they are widowed. Would the advocates of equality favor fathers' assistance, or would they rob the widow of her mite in order that she may enjoy equality?" In effect, the Pennsylvania law makes an allowance or pension for the proper maintenance of minor children when their mother is in indigent circumstances and their father dead, or insane.[17] The allowances under such laws are given to benefit poor children, both boys and girls, in order that their vitality may not be lowered by lack of food and clothing, that they may have the benefit of a home life instead of being inmates of orphanages or other institutions for dependent children, and that as men and women, they may be better able to perform the functions of citizenship. It is plain that both sexes have a beneficial interest in these laws albeit the allowances are ofttimes payable to mothers because they are ordinarily the judges as to children's physical needs. However, the proponents of equal rights favor measures on the order of the Colorado statute which authorizes the payment of the allowance to any parent, whether father or mother, who is unable from poverty to support his or her child.[18]

It is also said that a widow in Pennsylvania is allowed $500 out of the property of her deceased husband, free from the claims of his creditors, and that under the amendment widows can not be given this privilege as a class. The amendment would require widows and widowers to stand on an equal basis as to their rights in the estate of a deceased spouse, as is now the situation in some of the states. For instance, Maryland decrees that her laws "apply to and be enforced in favor of surviving husbands, as to give to, vest in and confer upon surviving husbands the same rights in the estates

6. N. Y. Laws of 1920, Ch. 284.
7. Fla. Rev. Gen. Stats. (1920), Sec. 5068.
8. Park's Ga. Code, Sec. 3137.
9. Bunting v. Oregon, 243 U. S. 426.
10. Adkins v. The Children's Hospital, 261 U. S. 525 (D. C.); Topeka Laundry Co. v. Ct. of Industrial Relations, 237 Pac. 1041 (Kan.).
11. Mass. G. L. (1921), Ch. 273, Sec. 1.
12. Cal. Civ. Code, Sec. 155; Ida. Comp Stats. (1919), Sec. 4654; La. Rev. Civ. Code, Art. 119; Mont. Rev. Code (1921), Sec. 5782; N. Mex. Stats. (1915), Sec. 2744; Ohio Gen. Code, Page's Compact ed., Sec. 7995; Okla. Comp. Stats. (1921), Sec. 6605; S. Dak. Rev. Code (1919), Sec. 167.
13. Colo. Comp. Laws (1921), Sec. 5575; Cahill's Ill. Rev. Stats. (1925), Ch. 68, Sec. 15; Pierce's Wash. Code, Sec. 1431.
14. Neasham v. McNair, 103 Iowa 695.
15. Iowa Code (1924), Secs. 10478-10481; Mass. G. L. (1921), Ch. 208, Sec. 34; N. Dak. Comp. Laws, Sec. 4405; Utah Comp. Laws, Secs. 3014, 2998, 3000.
16. N. H. Laws of 1907, Ch. 71, Sec. 3.
17. Pa. Laws of 1919, p. 893, Secs. 6, 9.
18. Colo. Laws of 1913, p. 694.

of their deceased wives," as is given "widows in the estates of their deceased husbands."[19] After payment of funeral expenses, the widow or widower in that state may claim an allowance.

Next, Mr. Lukens says that "the vagrancy laws of several states exempt women from liability to arrest as vagrants, and the statutes allowing arrest on civil process in certain classes of damage suits generally exempt women, or at least married women, from such arrests." Laws granting such immunities to women are few in number, negligible, and without value. If a woman really is a vagrant, she is a menace to society and ought to be arrested, as is the rule in New York,[20] Missouri[21] and practically everywhere. As a matter of fact, women are often arrested for vagrancy because of sexual immorality when their equally guilty male companions go free. And when, for malicious or wrongful injuries inflicted upon another, it is the policy of a state to allow the arrest of the wrongdoer on civil process, let the woman defendant be arrested in the damage suit brought by the injured party. Women are liable to arrest in criminal cases the same as men, and their arrest in civil cases on like terms with their brothers will work no hardship.

Mr. Lukens further remarks that "some difficulties would crop up under this amendment, intended by no one, which would be difficult to get around, in spite of their absurdity." Then he cites the Federal statute permitting effective and able-bodied young men, between the ages of sixteen and thirty-five years, to enlist in the Army, and says that it would be hard in the face of the amendment to exclude the enlistment of women.[22] But the Woman's Party says that enlistment should be open to effective and able-bodied women as well as men. Each recruit would then be assigned to the position in which he or she could best serve our country, as is now being done with the men. In view of the fact that during the World War, hosts of our men were assigned to hospitals, munition factories, ambulance units, transportation departments and offices, and that women have demonstrated their ability efficiently to perform such work, it is not clear why the thought of women enlisting in the Army should seem to Mr. Lukens such an "absurdity." Women have always borne the burdens of war with men, and will continue to do so as long as there are wars. Undoubtedly, the regulation of women's war work by the Army would greatly aid the nation since organized effort is far more effective than individual activity. It is, perhaps, in recognition of this, that there are constantly before Congress proposals for service for all citizens in wartime.[23]

The laws that are unjust to women far outweigh the few, if any, privileges in their favor. The following discriminations against women are typical of those existing throughout the country, and bear witness of the need for an Equal Rights Amendment: In Georgia the earnings of a married woman belong to her husband.[24] In New Mexico and Nevada, all property acquired after marriage by the industry of the husband or wife is their common property, and when the husband dies, he may leave his one-half to whomever he pleases, but on the other hand, unless a wife outlives her husband, it is a general rule that she can not leave a dollar of her one-half to anyone, not even to her own children.[25] By the laws of Texas, a husband is entitled to divorce his wife if she be taken in adultery, but a wife can not divorce her husband for infidelity unless he abandons her and lives in a state of adultery.[26] In Florida, when the death of a minor child is caused by the negligence of another, the father is permitted to collect all damages, including even for the "mental pain and suffering of the mother."[27] In West Virginia, the father inherits to the exclusion of the mother when their child dies without a will and leaves no descendants.[28] Under the Federal laws, an American woman marrying an alien ineligible for American citizenship loses her American citizenship, but, on the other hand, an American man who marries a woman ineligible for American citizenship, continues to be an American citizen, entitled to all the rights and privileges such a status confers.[29]

The writing of the principle of equal rights between men and women into a nation's Constitution is not without precedent. The new Constitutions of Germany,[30] Lithuania,[31] Esthonia[32] and Austria[33] are among those which provide that all citizens, men and women, are equal before the law. This provision in these Constitutions apparently has not brought about any of the disastrous results that opponents of equality are so fond of conjuring up concerning the Amendment proposed by American women.

One of the reasons why women insist upon a Federal Amendment is that it would establish the principle of equal rights once and for all, insofar as anything can be permanently established by law. It would override the present discriminatory legislation and prevent the sustaining of such legislation in the future. On the other hand, should equal rights obtain only by virtue of statutes, then the continued existence of equal rights would be subject to the will of each Congress, and each successive legislature in 48 states. That given at one session could be taken away at a later session. From past experience, women know they must exercise eternal vigilance to keep state legislatures from abrogating rights previously granted, and from creating new disabilities. It took 72 years of organized effort to secure woman suffrage. To change one by one the state constitutional provisions, and the other multitude of laws, that hold women in subjection, would take a century or so of work. The changing of state constitutions alone would require not only a favorable vote by the legislature but also an affirmative vote by the people on each discrimination, thus involving numerous costly and laborious state-wide campaigns. And if equal rights were ever attained by this piece-work plan, the result would be only an unstable equality which, for the most part, could be easily overthrown. On the contrary, if the equal rights principle were written into the National Constitution, it would be a part of the supreme law of the land,

19. Bagby's Md. Code (1924), Art. 93, Secs. 326, 317-318.
20. N. Y. Code of Criminal Procedure, Secs. 887-887a.
21. Mo. Rev. Stats. (1919) Sec. 3581.
22. Barnes' Fed. Code, Sec. 1560.
23. H. J. Res. 128, 68th Congress.
24. Ga. Rd. Co. v. Tice, 124 Ga. 459; Roberts v. Haines, 112 Ga. 842; Mock v. Neffler, 148 Ga. 25.
25. N. Mex. Stats. (1915), Secs. 1840-1; Nev. Rev. Laws (1912), Secs. 2164-5.
26. Texas Civ. Stats., Art. 4631.
27. Fla. Rev. Gen. Stats. (1920), Sec. 4962; Fla. East Coast Ry. Co. v. Hayes, 66 Fla. 589.
28. Barnes' W. Va. Code, Ch. 78. Sec. 1.
29. 41 U. S. Stats. At L., Ch. 411, p. 1021.
30. Germany, Const. (1919), Art. 109.
31. Lithuania, Const., (1922), Ch. 2, Art. 10.
32. Esthonia, Const. (1920), Art. 6.
33. Austria, Const. (1920), Art. 7, Sec. 1.

and with the other fundamental principles of our government, would be protected from sudden or violent fluctuations in public opinion. So it is clear that a national amendment is by far the surest, quickest and most inexpensive method of securing the equality of men and women before the law.

Every great reform has required adjustments, and the Equal Rights Amendment will not be an exception. Doubtless there will be instances where states will have to harmonize their statutes with the principle of equality. In preparation for the possible adoption of the amendment, each state having any necessity for so doing, may enact legislation bringing their statutes into harmony with the amendment. It will be recalled that some of the states at the time of ratification or rejection of the woman suffrage amendment passed supplementary legislation to become effective in case that amendment finally received the necessary thirty-six ratifications.[34] But even if the Equal Rights Amendment should for a time create confusion, that is preferable to the many injustices under which women now suffer. Moreover, it is better that the women of today undergo a few temporary hardships during the adjustment period than that generations of women spend their lives struggling for recognition of the equality principle.

Mr. Lukens intimates that in favoring the proposed Equal Rights Amendment, women act in ignorance. The Woman's Party had a staff of attorneys examine and tabulate all the constitutional and statutory provisions and court decisions in the United States relative to the existing status of women. In addition, Councils composed of different economic and professional groups of women, such as industrial workers, home makers, teachers, students and federal employees, conducted studies as to the desirability of equality, and the best way of establishing it in their particular fields. The Woman's Party did all this before proposing the Equal Rights Amendment, and in order to determine the wisest method to pursue. So any charge that the proponents of the amendment are not well informed is without foundation.

It is, of course, disappointing to women, that men of the legal profession are unable to see equality as equity when applied as between men and women. But then it is not surprising when one remembers that this defective vision, this regard of discriminations as "protection" is traditional. Blackstone, writing in the eighteenth century, shows how the legal existence of the married woman was suspended, how she had no control over her children, how she had no control over her earnings or other property, how the husband even possessed the legal right to give her moderate correction, and how these disabilities were "for the most part intended for her protection and benefit; so great a favorite is the female sex of the laws of England."[35] The chivalry of women in these matters has now been almost exhausted. The modern demand of the modern woman is away with protection, and on with equality!

34. For example, see Miss. Laws of 1920, Ch. 153-4; Va. Laws of 1920, Ch. 400.

35. Cooley's Blackstone's Commentaries, 4th ed., p. 392.

The Bar of the Past, Present and Future*

BY HON. F. H. HEISKELL

Presiding Judge, Tennessee Court of Appeals, Western Division

THE men whom I first knew as leaders of the bar of the past, were born more than a hundred years ago. They were giants in those days. I knew them here and elsewhere, in this and other states. They were men learned not only in the law, but in the history and literature of the law and they knew also the biographies of the great lawyers who had contributed to the development of our system of jurisprudence. They were likewise learned in the culture of the classics of ancient and modern times. Their arguments were orations, replete with law and logic and yet adorned with rhetoric and the learning of the schools.

The bar of the present is different, more orderly, more systematic, more business-like. Too busy for orations, they use briefer, plainer language and fewer fine phrases. They are intent on what is the law, rather than whence or how it came, or who made it. The current of cases means more to them than the philosophy of jurisprudence. If I may borrow an illustration, from one of that elder generation, I would liken the difference between the bar of the past and that of the present to the difference between two great columns of architecture. The great lawyers of the elder age were like Corinthian columns, stately and strong, yet ornate. Those of the present time are simpler, plainer like Doric columns, strong and graceful too, in their unembellished outlines. Yet each of these, the bar of the past and of the present, alike, in their day and generation has supported and still upholds the structure of the Temple of Justice.

And now in my mind's eye, I see another bar—a bar of the future. A bar drawn from the ablest of all the people of the world. A bar that shall practice before a Court in which the litigants shall be nations instead of individuals. A Court having jurisdicton to hear and determine questions heretofore triable only by the arbitrament of arms. A bar to whose keeping shall be entrusted the law of nations upon which depends the peace and safety of the world, upon which hangs the hope of human civilization. I see this bar fostering and developing this law and along with it a sense of justice and a supporting public opinion among the peoples of the earth,

"Till the war drum throbs no longer and the battle flags are furled
In the parliament of man, the federation of the world."

We honor and reverence the bar of the past. We admire and love the bar of the present. To that bar of the future, Hail and God-speed!

*Peroration of address by Judge Heiskell at the banquet given on Nov. 17, 1925, by the Memphis and Shelby County (Tenn.) Bar Association in honor of recently appointed State and Federal judges. Judge Heiskell was one of those thus honored.

DEPARTMENT OF PROFESSIONAL TECHNIQUE

A Clearing House of Practical Information as to Points of Law, Better Ways of Doing Things, Pitfalls to be Avoided, etc., Arising from Actual Experience of Members of the Profession

Common Counts and Federal Questions

THE Supreme Court of the United States just prior to adjournment for the summer of 1925 rescinded its previous rules and promulgated revised rules. These revised rules were effective July 1, 1925.

Among the new provisions found in these revised rules, none is more significant than that paragraph of rule 25 requiring the brief for plaintiff in error, appellant or petitioner to contain, among other things:

> A concise statement of the grounds on which the jurisdiction of this court is invoked, embodying: (1) The date of the judgment to be reviewed, with references to pages of the printed record—e. g. (R. 7)—where the judgment and its date appear. (2) The specific claims advanced, and rulings made, in the lower court which are relied upon as the basis of this court's jurisdiction, with page references to the printed record. (3) A definite reference to the statutory provisions under which such jurisdiction is invoked. (4) A reference to cases believed to sustain the jurisdiction.

This requirement must be met at the commencement of the brief.

I know of no better exemplification of the old saying—foresight is better than hindsight—than the numerous per curiams announced by the United States Supreme Court in dismissing cases for lack of jurisdiction because the record failed to show a federal question properly raised in the lower courts.

All lawyers know the importance of jurisdiction. Jurisdiction empowers a court to pass upon the case. Lack of jurisdiction removes this power.

Can it be true in each of the many cases dismissed by the United States Supreme Court because of the failure of the record to show federal questions sufficiently presented to the lower courts that the unsuccessful attempt to obtain a review by that court is a mere "afterthought"?[1] Certainly this should not be true.

In all jurisdictions using the common law system of pleading, the value of including common counts in a declaration is well known. A pleader in those jurisdictions who prepares a declaration in contract is indeed daring who omits to include the common counts. Common counts are sometimes looked upon as a "safety valve."

Probably in not more than one out of one hundred contract declarations in which the common counts are added as a "safety valve," is the "safety valve" brought into action. This fact is no sufficient reason for its omission. In those exceptional cases where the "safety valve" is brought into action, the need is not discovered until some emergency arises at the trial.

Chitty says of the common counts: such a count may sometimes save a verdict. Most emphatically may this be paraphrased and applied to properly raised federal questions: a federal question properly raised may save an appeal or writ of error to the United States Supreme Court.

Why should not a careful lawyer exercise just as much foresight by unmistakably placing in the record properly raised federal questions as by the inclusion of common counts?

As with common counts, so with federal questions, frequently only after it is too late to place them in the record is the necessity for bringing them into play realized. The common counts are not added to every declaration. Neither would a federal question be raised in every case. But an adequate consideration of every case would include a definite determination at *the beginning* whether the case presents one or more federal questions. In passing upon title to real estate, a failure to search for attachments or for mechanics' liens or for judgments would be inexcusable.

It must not be thought for a moment that this is an argument to overburden the docket of our Federal Supreme Court, or to carry there any case unjustifiably.

There come to mind two cases recently pending in that court, one from Nebraska and one from Minnesota, each seeking an adjudication of exactly the same question. In one the federal question had been properly raised in the lower courts. In the other the federal question had not been properly raised below. The facts in the two cases were exactly parallel. One was dismissed for lack of jurisdiction, solely because of the failure to raise the federal question below. Jurisdiction in the other was recognized, and an adjudication secured.

Not infrequently the stimulation of an aggressive trial develops a case in a manner not before conceived. Phases of the case may be brought out that previously remained undiscovered. The real turning point may at first have seemed of small consequence. Very lately an eminent counsel frankly stated to our highest court that not until he read the complete transcript as prepared for the United States Circuit Court of Appeals did he appreciate the pivotal point in the particular case, although this counsel had tried the case in the District Court.

Undoubtedly in many of the per curiam dismissals above referred to, constitutional or other federal questions of vast importance were potentially present. But decision of these questions was foreclosed *by the state of the record*. The prevention of such results is all that is here stressed.

It is hardly necessary to add that merely because a record may contain a federal question is not in itself justification for carrying the case to the United States Supreme Court. Before such a step is taken counsel will determine whether the question is frivolous or unsubstantial. To present to the United States Supreme Court a frivolous or unsubstantial question is of no more avail than to present none at all. Nevertheless, how much better to have saved the question in the record and subsequently make no use of it than to omit

1. See Caldwell v. Texas, 137 U. S. 692, 699, 34 L. Ed. 816, 819.

the question from the record and afterward awake to a realization of its need and importance! The analogy in the use of common counts is not inappropriate. What may at first appear to be of small consequence perhaps will later turn out to be of controlling importance, and vice versa.

Federal questions may be raised in demurrers, pleas, motions of various kinds, objections to or offers of evidence, instructions requested or objected to, assignments of errors, etc., and, at times, in petitions for rehearing. They should be raised at the earliest opportunity and repeated wherever applicable as the case progresses. They should be definitely incorporated in the written record. Even in informal proceedings, where written pleadings are not required, if a federal question is presented, this is done adequately only in writing, as by a written motion, protest or objection duly filed.

The federal question must be specific. The precise clause of the United States Constitution or the particular federal statute, treaty or right relied upon must be stated definitely and accurately.

What is more disheartening than to travel halfway across the continent, or all the way across, to argue a case before the United States Supreme Court, and at the threshold of that argument learn by the courteous but incisive questions from the bench that the court lacks jurisdiction, and that the want of jurisdiction is due to *the state of the record?*

It is a simple matter to add in time an additional ground to a demurrer, motion or objection or an additional plea, and thereby, if appropriate, include a federal question. The omission of these few words may later in the case prove disastrous.

Someone with a ready pen might write a fable of the common counts and draw a moral therefrom equal to any related by Aesop.

Revaluation of German Mortgages

In Germany the revaluation of the most important claims deteriorated through the inflation has been recently regulated by law. In numerous cases the revaluation takes place only on petition of the interested parties; the real estate-owner (debtor) also can object to the normal revaluation by filing a petition. These petitions must generally be made within a short space of time provided by law. The existence of a revaluation claim or of the priority rights of the creditors as well as the defensive measures of the real estate owner (debtor) are therefore subject regularly to a filing in the legally provided form within the space of time as provided by law and must be accompanied by the necessary proofs. The delay may have as consequence the loss of the right, as held in court decisions.

The measures, which must be taken within the given space of time, are various, according to whether the claim in question is governed by the revaluation law or whether the claim is to be revalued outside of the revaluation-law and in accordance with general principles of the civil law.

I. According to the Revaluation-Law Mortgages and similar rights are to be revalued

1. Measures for the creditor and others

(a) The creditor of a mortgage still recorded should promptly file a petition concerning the rerecording of the mortgage in the revaluation amount; in order to clarify his rights and to avoid any possible instrument.

(b) The creditor of a paid off (canceled) mortgage should immediately file his claim of revaluation, as far as he is entitled to the same. The time to file such claims expires by the end of 1925. A petition to enter an objection in the Real Estate Records must be filed.

(c) Petitions regarding the revaluation of the mortgage-claim at a higher rate than the normal one must also be filed without delay, in order to avoid any loss for not keeping within the time limit.

(d) A prematurity of the mortgage can only be effected by petition to be filed prior to April 1, 1926.

2. Measures in favor of the real estate owner (debtor)

(a) The debtor who desires to make objections must file a demurrer, which will be accepted only within a certain time.

(b) A reduction of the revaluation can be effected for the real estate owner only if a proper petition within a given time has been filed.

(c) An extended maturity of the mortgage can only be safeguarded, if the real estate owner files such a petition prior to January 1, 1927.

Mortgages and other incumbrances of the real estate are regularly revalued at 25% of the gold value and calculated at the gold mark amount subject to the time of the acquisition by the creditor and in accordance with a revaluation schedule attached to the law. If payment was made during the inflation period and the right has been canceled in the Real Estate Records, a revaluation nevertheless takes place, in case the creditor has made any—even an informal—reservation, or if the payment was made during the period of June 15, 1922, to February 14, 1924, or if the creditor has assigned his right after the 14th of June, 1922. In certain privileged cases a retroactive redating of the acquisition of the new creditor is made to the date of acquisition by the former creditor. Certain classes of mortgages, especially the Balance of purchase price mortgages made after December 31, 1908, and the Surety-Mortgages can be revalued over the normal rate of 25% up to 100% in regard to the personal claim. Petitions in all these cases are to be filed with the Revaluation Offices.

II. Revaluation Outside of the Revaluation Law

Any such revaluation is possible for debtors as well as for creditors, only by bringing such in the proper courts. There is no legal restriction as far as the amount is concerned, which is subject exclusively to the principles set by the decisions of the Highest Court (Reichsgericht at Leipsic). Subject to this revaluation are claims arising from association contracts or participation in business, or claims from contracts of sale or employment, especially also the revaluation of Inheritance Claims and of former partition arrangements between heirs.

CARL WALLIS VON HELMOLT.

Contributions

The articles and letters contributed to the Journal are signed with the names or initials of the writers, and the Board of Editors assumes no responsibility for the opinions therein, beyond expressing the view, by the fact of publication, that the subjects treated are worth the attention of the profession.

UNLAWFUL TRADE COMBINATIONS IN HISTORY

Industrial Conferences and a Recent U. S. Supreme Court Decision—Some Historic Truths—Problem of Unlawful Trade Combinations Is of Great Antiquity—Some Ancient Regulations—Early English Efforts to Deal With It by Statute and Otherwise—Futility of Certain Measures.

By Thomas W. Shelton
Of the Norfolk, Virginia, Bar

INDUSTRIAL Conferences, a featural element in American commercial endeavors until they fell afoul of political and legislative disfavor, were recently awakened from obsolescence into a highly controversial activity by the majority opinion of the Supreme Court of the United States in the "Maple Flooring" and "Cement Manufacturers Exchange" cases (17 U. S. S. C. Ad. Ops. 662, 672; 67 L. ed. 1925). The "favorableness" of those cases, however, would seem to lie more in the final judgment than in the reasoning. They would seem to stand, from their very nature, to too great an extent on their individual facts to be safely followed as authority. The prudent will prefer that each particular "Conference" or "Exchange" should have a fresh judicial analysis to insure that it does not "necessarily result in such concerted action" as to be unlawful. Nor will the relativity of the controlling word "necessarily" be overlooked by the thoughtful.

The Real Truth

With centuries of industrial history crying aloud its monotonous repetition, two things are obvious: These meetings are pink teas or they are business conferences; they are for social gossip or for the exchange of trade information. One is at liberty to choose and take his chance. It may be that the present trend is away from the critical Rooseveltian standard towards a less hostile viewpoint. One is constrained to believe, however, that when possessed of reliable knowledge of output, the stock on hand, the demand and past prices, experienced and intelligent men will be led to a common trend of thought that will mature into a sentiment and culminate in a fixed commercial policy. This being the achievement is it the result of the "conference," "exchange" or "breakfast"? If so, is it the "necessary" result? Wherefore there was predicted the necessity for a judicial license for each separate "conference" or "breakfast." We venture to suggest that the "law" of the thing is a public state of mind and with about as much stability. Hence we observe much legislation, divided courts and announcements of administrative policies. All of which evidence a weakness in the present remedy against unlawful combinations in trade.

Nothing New Involved

There is nothing novel in this controversy, although upon it may turn millions of dollars as it affects the selling price of goods. Trade conferences are and always have been needed in the healthy advancement of a national industry. It is when they lack self discipline, come under control of avarice, or inordinate ambition that they "necessarily" result in a conspiracy to oppress the consuming public. That is the key to the remedy. They are in their nature antithetical to competition and are suppressive of the law of supply and demand. Therefore they are insecure agencies in irresponsible hands and an alluring temptation to all. It is, in fact, one that humanity seems to have been so unable to resist as to have provoked constant governmental regulation or prohibition. The legislation has generally been more useful to politicians than to the people. The desire for monopoly, in one way or another, seems to be a controlling human passion. The avocation of vilifying it is a valuable political asset. We might as well accept these historic truths as natural phenomena, so to speak.

In the Beginning

Combinations in restraint of trade or the American "trust" that grew into a militant political issue, were old and hoary when both the Sherman and the Clayton Anti-Trust Acts became a law—just how old there is no recorded history. That misfortune, however, should add zest to a study of their past. While one may be inclined to believe on general principles that either Cain or Abel might have been guilty, and thereby justified the criminal lawyer in capitalizing an inherited trait, we must be confined to "modernity." When that modern militant crusader against "trusts," Theodore Roosevelt, was energetically fastening his fame to the vault of the heavens, he was merely repeating another aggressive Ruler of a people that were oppressed by "regrators, forestallers and ingrossers." (Zeno, Emperor of the East, A. D. 483. See post.) If Congress having in mind the Sherman law, had introduced the Clayton Bill by saying that "Albeit divers good statutes heretofore have been made against forestallers . . . and the said statutes have not taken good effect, according to the minds of the makers thereof . . .", it would have found itself quoting the exact language of the English Parliament in the 5th and 6th years of Edward VI (1551-2) (An Act Against Regrators, etc.). If in its wisdom it became of a mind that manufacturers and traders should not foregather under any pretense, lest they be tempted to forestall, it could have saved itself trouble by going back four centuries and copying the above cited English statute. Had it desired to prevent the raising of prices by means of signs and unspoken language, it need have gone no further. Had they desired to be well and briefly refreshed as to the legal principles involved,

they could have examined the Book upon which its members qualified and found treatises designated respectively as Proverbs 11:26; Job 29: 11-17; Amos 8:4-10, speaking illuminatingly upon the subject. Solomon, speaking long before the "glory that was Greece and the grandeur that was Rome" told the Israelites that, "He that withholdeth corn, the people shall curse him; but blessings shall be upon the head of him that selleth it."

Some Ancient Regulations

So, we have tried to establish by very respectable authority that the Americans of today possess no trade opportunity or tendency or temptation to monopoly and the artificial fixing of prices, that was not well known and practised by the ancient Hebrews, the contemporaries of Christ, or the Byzantines with their ten century old government. Zeno in an edict to the Praetorian Prefect of Constantinople (Code IV 59; 8 Canadian Law Times 299, 300; 23 Am. L. Review 261) ordained that "We command that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, either of his own authority, or under a rescript of an Emperor already procured, or that may hereafter be procured, or under an Imperial decree, or under a rescript signed by our Majesty; nor may any person *combine or agree in unlawful meetings,* that different kinds of merchandise may be sold at a less price than they may have agreed upon among themselves." We shall have light later on how this may not be done, even in the *absence of words.*

Ancient Labor Unions

Even labor was also well versed in combining and therefore did not escape the observant Emperor of the East, for he likewise ordered that (supra) "Workmen and contractors for buildings and all who practice other professions, and contractors for baths, are entirely prohibited from agreeing together, that no one may complete a work contracted for by another, or that a person may prevent one who has contracted for a work from finishing it." That provision is most striking in its modernity.

Some Old English Regulations

Returning to the English we find that Parliament under Edward VI (5th and 6th, 1551-2) enacted, "That whatsoever person or persons . . . shall buy or cause to be bought any merchandise, victuals or other thing whatsoever, coming by land or by water toward any market or fair to be sold in the same, or coming towards any city, port, haven, creek, or road of the realm of Wales, from any parts beyond the sea to be sold, or make any bargain, contract, or promise for the having or buying of the same, or any part thereof, so coming as aforesaid, before the said merchandise, victuals, or other things, shall be in the market, fair, city, port, haven or creek, or road, ready to be sold." This is followed by a clause forbidding purchase for the purpose of resale in the same market or fair or one within five miles thereof.

Coal Combines in Seventeen Hundred

When the coal operators were proceeded against criminally some time ago in America, the district attorney might well have discarded his copy of the Federal Code and substituted Chapter 53, Sec. 2, 28 George III (1788) as follows: "And whereas, a certain number of coal buyers have formed themselves into a society and held private meetings at the local exchange in the City of London, *professing to make regulations for the purpose of carrying on the trade in coals,* which regulations may have a tendency to prevent the said trade from being free and open; be it further enacted by the authority aforesaid . . . that any number of persons united in covenants or partnerships, or in any way whatsoever, consisting of more than five persons, for the purchasing of coals for sale, or for making regulations with respect to the manner of carrying on the said trade in coals, shall be deemed and adjudged to be an unlawful combination to advance the price of coals . . ."

Royal Patents Judicially Outlawed

A diversion might be helpful at this juncture to bring out another monopolistic agency that was destroyed by the courts, in spite of the Parliament and the Crown. Royal patents for monopolies to favored individuals not only existed in early England but, under Elizabeth, who had no other convenient way of compensating her warriors, covered almost every item of necessity (See Hume, Hist. Eng. Harper Ed. 335-6). A spirited example of it flourished in Cuba until it was destroyed through American influence. It may be found in Mexico today, in some respects. As the spirit of equal opportunity grew in strength in England, the legality of these patents, as being in violation of natural rights and equality under the law, was subjected first to open criticism and then to successful litigation until, in 1602, they were declared void in Darcy v. Allen (11 Coke 84b, 86b; 6 Butterworth Ed. 162; 3 Inst. 181). This case supplies such lucid analysis of their operation and interesting argument against trusts and monopolies in restraint of trade and their effect upon both government and the governed that its perusal is commended to every student of the philosophy and science of the law.

Coke's Analysis of Trusts

Very briefly put, Coke argued that prices will be raised because one possessing "the sole selling of any commodity, may and *will* make the price he pleases;" that merchandise produced under a monopoly "is not so good or merchantable as it was before, for the patentee having the sole trade regards only the private benefit . . .;" that it tends to the reduction of wages and to idleness, through curtailment of production. These be unanswerable reasons based upon a human nature and drawn by a great jurist out of the experiences of the ages (Deut. 24:6) that never has been and never may be prudently ignored. The court nullified an act of Queen Elizabeth, itself an epochal event.

Royal Trusts Prohibited

One would be exceedingly wise to be mindful that the Scotch Presbyterian, James I, wrote a book that was not published until 1610, entitled "A Declaration of His Majesty's Pleasure, etc." Now the reporter in Darcy v. Allen (supra) read this book and quoted from page 13 thereof, even if the learned Judge was not so fortunate, and sets down the following most creditable observation: "And

our Lord, the King that now is, in a book which he, in zeal to the law and justice commanded to be printed . . . has published, that monopolies are things against the laws of this realm; and therefore expressly commands that no suitor presume to move him to grant any of them." So it is apparent that the tendency to monopolies and combinations of all character was as prevalent and threatening just before the settlers anchored at Jamestown as they are today. Our ancestors probably brought the inherited trait with them. It is a historical fact that Wingfield monopolized all the ardent spirits at Jamestown, until the trust was dissolved by a new administration.

The Courts Invoked the Common Law

While it is quite apparent that during the days of George III, official vigilance against combinations and trusts was much relaxed and legislative sentiment had changed, even to the extent of repealing the statutes of 5th and 6th Edward VI heretofore discussed (12 George III, Chap. 7), it is equally an outstanding fact that the courts paid very little attention to the legislative repeal, being satisfied that the great common law justified them in suppressing monopoly. And they did. (But see Act of 1623, 20 James I, Chap. 2.) In the case of Rex v. Waddington 1 East 143, 156, the Court said: "I am perfectly satisfied the common law remains in force with respect to offenses of this nature; and in considering whether that was intended to be done away by the Act of the 12 George III, I cannot regard the resolution entered on the journal of the Common House of Parliament, but must look to the statute book, and there I find nothing which touches upon what I have said, but only a repeal of certain statutes, upon none of which is this prosecution founded, but upon the common law."

It seems that there were also adroit lawyers in these days for as late as 1800 Lord Kenyon held that the possession of the entire production, as was contended by the accused, was not essential to the offense of creating a monopoly. Thus we find the interposition of the doctrine of relativity which seems to be the American doctrine of today.

An Old Definition

Just at this juncture we may profitably examine an old definition of unlawful restraint of trade and the manner of achieving it, as laid down first by the courts and next by the Parliament. In Rex v. Waddington, supra, it was said "his traffic . . . was carried on with a view to enhancing the price of the commodity, to deprive the people of their ordinary subsistence, or else to compel them to buy it at an exorbitant price; who can deny that this is an offense of the greatest magnitude? . . . *If humanity alone can not operate to this end,* interest and policy must compel our attention to it. Now, this defendant went into the market for the very purpose of tempting the dealers in hops to raise the price of the article, offering them higher terms than they themselves proposed and were contented to take, and urging them to withhold their hops from the market in order to compel the public to pay a higher price. What defense can be made for such conduct? And how is it possible to impute an innocent intention to him? We must judge of a man's motives from his overt acts, and by that rule it can not be said that the defendant's conduct was fair and honest to the public. It is our duty to take care that persons, in pursuing their own particular interests, do not transgress those laws which were made for the benefit of the whole community." It is doubtful if that definition will be improved, because it takes account of human nature and rests upon common sense. And what a reflection it is upon the ethics of the commercial personnel!

The Sign Language Forbidden

Turning now to the Act Against Regrators, etc., previously cited, the promise to show how prices may be raised without the aid of vocal agreement will be made good. We find Parliament forbidding traders and manufacturers to "make any motion by word, letter, message or otherwise, to any person or persons, for the enhancing of the price or dearer selling of anything or things above mentioned, or else dissuade, move or stir any person or persons coming to the market or the fair, to abstain or forbear to bring or convey any of the things above rehearsed, to any market, fair, city, etc., as aforesaid shall be deemed, taken and adjudged a forestaller." This prohibition probably enters into greater detail of description than any other since it *forbids transference of thought by any device.*

This is the statute that is recognized as the most extreme and that stood until repealed in the reign of George III. Nevertheless, we have seen that it was pronounced by the courts to be merely declaratory of the common law and therefore its repeal produced no limitation on the law against trusts as defined by the courts. In other words the fearless and far-seeing courts properly assumed that there were certain natural rights as to which no legislation was needed for their protection. (For the elucidation of this sacred principle see Mr. Justice Miller's opinion in Citizens, etc., Co. v. Topeka, 87 U. S. 655; 22 L. ed. 455.)

The Punishment

In the punishment meted out one is obviously interested, for it will prove a fine index to the character of the offense. Zeno (see ante) provided that "if any one shall presume to practice a monopoly, let his property be forfeited and himself condemned to perpetual exile." Fearing that corruption of the judiciary might be attempted by trusts, Zeno also provided that "your court shall be condemned to pay fifty pounds of gold if it happen through avarice, negligence, or any other misconduct, the provisions of this salutary constitution for the prohibition of monopolies and agreements among the different bodies of merchants shall not be carried into effect.'" (Canadian Law Times, supra.) The Act of 5th and 6th Edward VI, provided for the first offense "imprisonment for two months without bail or mainpraise and double the value of the goods." For the third offense one was set in a pillory in his home town, forfeited all his property and was imprisoned at the pleasure of the king. The offenders were proceeded against by indictment or information in the King's Bench at Westminster.

Commercial Growth Influences a Change

But times change and public sentiment changes with them. Eventually the hostility to trusts surrendered somewhat to the demand of foreign trade

for economic combinations. Incidentally the same policy is advocated in America today and, as we shall presently see, has not fallen entirely upon deaf ears. It promises to become a political issue as if it were something new. It applied to labor as well as to trade and manufacture in England. The most satisfactory explanation of this change of English sentiment was given by Lord Justice Bowen in his lucid opinion in Mogul S. S. Co. v. McGregor, L. R. 23, Q. B. Div. 598. The reversal of sentiment was a recognition of an obvious growth of commerce and industry that had commenced, for the first time, to make itself felt in government. It was the obvious decay and loss of influence of the patriarchal and feudal institutions that had controlled, to its great disadvantage, the English social and economic viewpoint. It will be noted that these same agricultural, industrial and labor issues recur as American political issues. First one then the other protrudes itself mostly in the vision. While the ascendancy of commerce to a suitable recognition by government was but a normal expectancy, one is inclined to subscribe to the views of Edward Jenks (Short History England) that Edward I, the "English Justinian," made possible the change. He seems to have sensed the potentialities of a great English commerce and legislated in its interest. His famous "Statute of Merchants" or "Acton Burnell" lifted the merchant from the rank of the "foreigner" who, deprived of all personal privileges or rights, had previously to be protected by a patron like an infant with his guardian. Commerce, that had been condemned as furnishing an opportunity to cheat or make usurious profits, was lifted into the high place of a most useful and honorable vocation (3 Select Essays Anglo-Am. Leg. Hist. 139). This article is well worth study.

Commerce Seeks Freedom

Indeed, it soon came to pass that National strength was measured by commercial prosperity as it is done in America today, for "the power of the state would be best secured by measures which ensured the expansion of commerce." "Thereupon," said Holdsworth (6 Hist. Eng. Law 359), "the scientific man demonstrated the futility of attempting to legislate against the natural laws which he had discovered. The commercial man found in these demonstrations an additional argument in favor of the policy which he advocated." The argument of the merchants, pointing out the fallacy of the Bullem Exportation Bill of 1690 (Hist. M. S. S. 13th Dep. App. Pt., V. no. 330, pp. 181, 2; no. 353, pp. 205-7) is a splendid evidence of the militant part they were now taking in government and which would have been wholly impossible a few years before and before England commenced to think nationally. Other incidents appear in the article that are of equal significance and highly indicative of a full recognition of traders and the dependence of government upon the men of commerce.

Labor Combinations

Contrary to modern policies, labor combinations did not escape the regulation of anti-trust legislation, but stood on the same plane with merchants and manufacturers during the period just discussed, and for obvious reasons suffered more. Mention has been made of the restrictions of the Emperor Zeno, A. D. 483, that might have been prepared for the year in which this is written. Hammurabi (2530 B. C.) seems to have had no labor troubles for the simple reason that he laid down a schedule (Sec. 273 et seq.). During the long days from April, which is the beginning of the year, to the fifth month, a farm hand received a higher compensation than for the other months. The wages of artisans were also fixed by statutes (Sections 274, 257, 261). The duties, responsibilities and punishment of laborers were onerous and severe (Sections 253 to 267). A glance at the Old Testament would indicate a similar governmental policy for fixing wages, for the young Levite (Judg. 17-10) received ten shekels a year; the angel Raphael (Job 5:14) a drachma a day; while the laborers in the vineyards (Matt. 20:1) received a denarius a day, though at a later period the yearly system appears to have been in vogue (Lev. 25:53) and under a formal contract (cp. Job 41:4). The Mosaic law does not seem to have fixed a scale of wages, but only legislated to assure the payment of wages promptly and in full (Deut. 24:14; Lev. 19:13; cp. Jer. 22:13 and Mat. 3:5). A search of Muhammadan jurisprudence (Rahim, 1907, London, Luzac & Co., p. 317) fails of achievement in that respect. There is a mere prohibition against selling onself into slavery. Holdsworth (6 History of Eng. Law, p. 347) discourses interestingly on the subject. Like the poor, labor troubles seem to have been always with the English. During these years labor relations appear to have fluctuated much between substantial serfdom and violence. It is helpful to follow Holdsworth a little way.

Labor Under the Tudors

Under the Tudors and early Stuart Kings, wages as well as prices were part of a coherent governmental scheme for the regulation of employer and employee. Neither was permitted to contract. The nearest America ever approximated such a condition was during the price-fixing period of the World's War, except that labor was left free to contract as it pleased. And it did. It was a paternal if not a benevolent government in England because largely under the influence of patriarchal and feudal institutions. A national conception was wholly absent. In rebuilding after the great fire in London in 1666, special statutes (18, 19 Charles II C. 8) were provided, embodying these principles and regulating both prices and wages. The Judges of the King's Bench were authorized to fix the rate of wages of workmen, to the end that none might "make the common calamity a pretence to extort unreasonable or excessive wages" (Sec. 15 supra). It embraces by name of vocation all persons that might be engaged in and about building and, of course, includes merchants. A refusal of the merchant to sell or the laborer to work at the named rate or to depart from the work without leave, was made punishable by a month's imprisonment or a fine not exceeding £10. This seems to have been but little more than the spirit if not the intent of the regular law.

And Then the "Dole"

Now it will be noted that, while the laborer was coerced to work, the employer was not obliged to keep him employed. This unequitable condition brought about idleness and consequent poverty that had to be recognized and relieved by the Government. Thus originated a system of alms that has

been dignified into "doles" in contemporary times and continues its destructive course to this day. It was at best but a temporary charitable expediency. It is a political cancer eating away the very vitals of a noble and useful people, both as to substance and spirit. It was an expedient to compensate for the gross error of forbidding freedom of contract and residence to laborers. Economic equilibrium was destroyed because labor was not permitted to flow from idleness in one vicinage into employment awaiting in another. It was obviously the state's duty to provide for a man that it would not permit to seek work. When the laborer and the merchant were both set free, the merchant's character was not handicapped with charity like the laborer, nor was the tax payer burdened with his living. He became a real freeman and in consequence has become England's mainstay. Of these pauper laws, attributable to the lack of freedom of contract and of residence of both trader and laborer, although full of human interest and economic errors, there is not space to do more than make a mere reference to contemporaneous writers, where the subject is ably discussed. Viewed politically it is quite apparent that the lack of equity in so one-sided a treatment commanded the necessary public and legislative sympathy to effect its correction. But the "dole," that grew out of it, continued when it should not have been needed, with its character-weakening results. However, the repeal of the old laws proved to be the harbinger of a new era of individual labor freedom. After that, in law, restrictions continued only in the printer's trade, which was deemed of a character requiring absolute control, and persons familiar with that trade will testify that it is still sui generis (Holdsworth, p. 369, 372. But see 14 Charles II, C. 32, Sec. 15).

The Practical Viewpoint

But, like all innovations and particularly legislative attempts at regulating economic laws, their installation brewed trouble. It seems to have put some brilliant minds to philosophizing and analyzing. This English economic period gives an understanding of the inspiration of some well nigh immortal treatises. Mr. Petty (see post) bluntly points out that these relieving statutes were not observed by employers whereby the period of labor adjustment to the new conditions was wickedly delayed and much human suffering occasioned. Pepys' (Ed. by Wheatley IV 342) is cited by Holdsworth (supra p. 357) to show that public opinion was rapidly converted to the belief "that the course of trade might, in many cases, be too strong for the legislature." He quotes Pepys as setting down a conversation held with an official that "the men who knew the world of commerce had a very practical knowledge of what laws were efficacious and what not." A saying of Petty was then quoted: "Too many matters have been regulated by laws which nature, long custom, and general consent ought only to have governed." This language seems fairly to portray a robust public opinion, freeing itself from the influence of the Crown, which is in fact the "middle" atmosphere between the peerage and the laborer that was making itself felt. It connoted a hostility to an enervating paternalism. It seems to be the unrecognized birth of a new power in England that has ever since been audible in political conferences and will doubtless preserve its institutions in its next labor crisis. Neither of the extremes seem entitled to the glory of the present great government.

The Period of Violence

This unsatisfactory enforcement of the statutes was followed by a period of strikes. This violence was sought to be suppressed by Proclamation in 1718, but like all government by duress it achieved little and finally worked its own dissolution. As early as 1671 the coal miners at Newcastle on Tyne had become tumultuous over wages and treatment. (S. P. Dom. 1671 p. 297). In the early part of the Eighteenth Century, acts aimed probably at both employer and employee, were passed prohibiting combinations in respect of the "amount of the wages payable in certain trades" (Holdsworth p. 349). Adam Smith philosophises interestingly on this subject in a manner that must be read to be appreciated. (Wealth of Nations. Bk. 1, Chap. X.) Eminent statesmen are still fatuously trying to repeat the failures pointed out by Adam Smith because they fall afoul of economic laws and human nature. The influence of these elements seem to have changed little since they proved their power in the early English struggle for commercial life, as factors more potential of achievement than the vaunted wisdom or wicked expediency of political legislation.

The Arguments of Child and of Petty

Holdsworth introduces us to two interesting characters, landmarks within themselves and who are really the economic Montesquieus of England. Each prepared briefs against any statutory regulation for either merchants or laborers. Child (A New Discourse on Trade (1649) 147) was in commerce and Petty was an economist. (Economic Writings of Petty Ed. by Hull). They composed an ideal pair. Child's practical philosophy was that "they that can give the best price for a commodity shall never fail to have it, by one means or other, notwithstanding the opposition of any laws, or interposition of any power by sea or land; of such force, subtlety and violence is the general course of trade." He applied this doctrine to labor also. But, while it aids the merchant who was able to achieve for himself, it was not the work of any author that gave the laborer his freedom. It was an incident of the sentiment robustly maturing in the business world, "that success or failure in any given business was due to individual merit or demerit, and that the active supervision and regulation which was characteristic of preceding periods (particularly following the Restoration) was an error," as had been well demonstrated by both poverty amongst laborers and bankruptcy in business. Whether the laborer has sacrificed any of his hard-earned freedom and usefulness to society to the Union is not a relevant subject, except as and when the Union becomes a combination in restraint of trade. As an economic element labor then stands on the same plane as merchants and producers, for labor is not a commodity. Laborers therefore exercised the good sense to fall into the parade and keep step, so to speak, with the merchants in the militant use of their freshly won freedom, involuntarily given to them by new foreign trade conditions. Under these new conditions, the merchant was no better off than the laborer, but at that time was best in po-

sition to exercise both defense and offense. It is well to be mindful of that distinction.

Laborers were now left alone to bargain for themselves when and where they pleased instead of being confined, as in the past, to their own vicinage except upon impossible terms as to bonds of security against becoming a public charge. Previously they had of necessity become wards of the government or church or charity in their own vicinage when out of work, for they might not seek it elsewhere. It appeals strongly as one of the darkest days of labor, the very zero of labor conditions. When set free they were quite unprepared for self-protection. The Government dole seems to have taken the place of these private and town charities in order to ease over the period of transition.

Turning now to the merchants. The influence of men in commerce had commenced to be felt in politics and in government. Labor had no real part, for it was not in a condition to exert influence. It is at this point that the paths of the merchant and the laborer show a divergence. The Crown commenced to discern a new economic light, wherefore we see the merchants being encouraged. In 1669 industry and commerce were valued to the extent that a committee was appointed to consider the "cause and grounds of the fall of rents and decay of trade within these kingdoms" (Holdsworth p. 355). Indeed such a new political era had set in that the aforementioned "inquiry" sounded more like a contemporaneous Congressional investigation searching for votes, than a sober English effort to improve trade, at a time when votes had no value.

It evidences how rapidly Commerce, under the stimulus of a proper recognition, was advancing in affluence and influence. It may be that a similar treatment of labor might have turned self-destructive violence into an equally healthy growth and self-dependence. From this history one concludes that if industry does not support labor, either charity or the Government has always had to do it. Since commerce is the creator of wealth in association with labor, they are inseparable economic associates, instead of rivals or enemies.

Upon the inefficacy of legislative control of trade and labor, Holdsworth points to the contemporaneous writings of Petty and Hull and shows that Petty was an enthusiastic disciple of Bacon as well as one of the first writers to "give reasons for economic phenomena and to explain these phenomena by natural causes." Since the reader is invited to study the practical Petty's philosophies as being helpful in solving modern problems, it might increase confidence to permit him to be introduced by Evelyn (Diary, 22 March 1676), who said of him: "There were not in the whole world his equal for a superintendent of manufacture and improvement of trade or to govern a plantation."

While commerce is much regulated in America by statutes, some of which are necessary, a lesson may be learned from a striking similarity in economic changes occuring in England. It behooves us to see that the guidance of reason in the growth of the commercial law, the costly lessons of the past, and the salutary effect of philosophy on the utility of the law, shall not be lost. The English government, prior to the 17th Century, as we have seen, attempted to ascend to achievement upon the prostrate bodies of both commerce and labor who were ignored in government and treated as wards of the Nation. That it saw its mistake, and permitted itself to be lifted to its present high level through the combined strength of the two is to its credit. English commerce reaches around the world. That it will wean labor from the dependence of a suckling at the breast of the public treasury where the Government placed it, to respectable self-support will not be doubted. That the people were able to break away from the retarding influence of centuries of patriarchal and feudal institutions without resort to revolution, is an exemplification of the power to solve serious difficulties. The failure to take into account the well known English spirit of obedience, that submits until reason shows the necessity for a change, has caused more than one false diagnosis and prediction. It is reflected in the oft-heard response to expediencies that "it is not done that way." The inimitable and erudite Roscoe Pound of Harvard humorously established English stability of government through personal character upon this one premise and there one is well content to let it rest. (Address Oklahoma Bar Association, 1925). America will do well to profit by this history that is endeavoring to repeat itself.

Holdsworth (Vol. 6, p. 357) approvingly quotes North (Discourse on Trade (1856) p. 540) as saying: "No people ever yet grew great by politics, but it is peace, industry and freedom that bring trade and wealth and nothing else." When American business men learn to suppress greed, achieve self-discipline, unselfishly recognize the consumer and content themselves with normal profits then, and not 'till then, will they have won surcease from political intervention in their affairs.

Gordon Edward Sherman

On Nov. 28, 1925, Gordon Edward Sherman, former Assistant Professor of International Law at the Yale Law School, and for many years editor for Switzerland of the Comparative Law Bureau of the American Bar Association, died at Morristown, N. J., at the age of 71. Mr. Sherman was a lineal descendant of Jonathan Dickson, first president of Princeton College, and of the Rev. John Sherman of Emanuel College, Oxford, England. He received his preparatory education at College Gaillard, Lausanne, Switzerland, later graduating from the Sheffield Scientific School, Yale, and Washington University Law School. He began the practice of law in his native town, Morristown, N. J., and for some time served as examiner and special master in chancery. He was assistant professor of Comparative and International Law at Yale in 1911-16; was the editor of the fourth edition of Davis' "Elements of International Law" in 1916; revised the English translation of the Swiss Civil Code published by the American Bar Association; was the author of numerous articles on comparative and international law which appeared in the leading law reviews of the country; acted as co-rapporteur (in French) of the International Prison Congress at Washington, D. C., in 1910; was the Yale University delegate to the Conference of International Law Teachers in Washington in 1914 and to the Second Pan-American Scientific Congress at the same city in 1915; was a member of various learned societies in this country and Europe. He was married on June 12, 1894, to Harriet E. Shelton, of Morristown, who survives him. These details are taken from the National Cyclopedia of American Biography.

TORTS

By Charles P. Megan
Of the Chicago, Illinois, Bar

(Continued from page 60, January, 1926, issue)

THE other blow to our doctrine of "no liability without fault" has a longer history. The remote, if not the proximate, cause of the Workmen's Compensation Laws with which we are familiar was the "Industrial Revolution" of the early nineteenth century. It is not commonly recognized that such a revolution is a greater catastrophe than a political revolution, and causes far more suffering and loss of life. The results in the long run may be good, as were the results of the French Revolution, but for the immediate losers there is untold misery. An industrial society, organized in a local way, on a small scale, with the individual workman as the unit, is suddenly and violently changed over to fit a highly organized factory system, with standardized, quantity production, where the individual is a living cog in a great machine. In the older days, when a man had only a few employees, they were more nearly on an equality with him, and there was a *human* relation. The bankers of London, not much over a hundred years ago, found that forgers of bank-notes escaped hanging (then the punishment for this and a great number of other offenses against property), because the individual banker was too merciful, and an association of bankers was formed to take that human element out of the situation; the accused thereafter was to find himself confronting an impersonal institution, without the human weaknesses of mercy and pity.

Something of the same kind happened in industry. The small workshop was swallowed up in the vast mill or factory. Yet today we grudgingly concede to workmen the right of collective bargaining and the protection they get from their labor unions; we try to cling to the now-impossible theory that the common laborer, who is to industry what the "man with the hoe" is to agriculture,—that the common laborer, applying to a great industrial corporation for a job, is perfectly able to take care of his own interests, and that when he makes the contract of employment, *then* is the time for him to put in any terms that he thinks necessary to protect his rights in the future; whereupon the parties, of their own free will, and as equals, having agreed upon the terms of employment, the matter is none of the State's business any further, except to see that the terms are strictly observed.

Take the fellow-servant doctrine, for example, which is firmly established as law on both sides of the Atlantic Ocean,—that an employer is not liable to one employee for an injury caused by the negligence of a fellow-employee. The theory is that one servant should keep an eye on the other, notify the master of "misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents, as the safety of all may require." Compare the possible reasonableness of this doctrine in the Biblical instance of two women grinding at a mill with its application to the case of two employees of a great railroad system who never saw or heard of each other.

So with the doctrine of assumed risk. As for contributory negligence,—in collisions of boats, where there is fault on both sides, the loss is apportioned; but on land, if there is mixed into the affair the smallest negligence on the plaintiff's part, that one-tenth of one per cent spoils the whole brew, and the defendant goes off scot-free.

§

With the law in this shape some observer of the situation decided that this would have to stop. There was much groping about for a principle that would justify doing something about it, but the leaders of the movement appeared not unmindful of the example of Frederick the Great, who, when he wanted some neighboring territory, would take it, and later employ some one to formulate a favorable theory in support of what he had done. The first Employers' Liability (or, more correctly, "Workmen's Compensation") law in this country was the New York act of 1911. The court of appeals promptly declared it unconstitutional. Some one thought of cutting the Gordian knot, of saying to the employer, "Take our Workmen's Compensation plan or leave it; but if you don't take it, we will abolish your three pet defences of assumed risk, the negligence of a fellow-servant, and the contributory negligence of the person injured." There has been reasonably plain sailing ever since; we have practically an insurance scheme, with the cost charged up to operating expenses; but we are not yet sure what "godless giant" we have "provoked,"—whether "eminent domain" or "the police power," or perhaps a *tertium quid;* in any event some principle ultimately referable to the law of self-preservation,—*Salus populi suprema lex.*

§

With *Rylands* v. *Fletcher* laying down a number of things we may do only at our peril, fault or no fault, and with Workmen's Compensation Laws boldly dropping the idea of fault altogether, our long and painfully wrought out scheme of tort-liability seems to be in a bad way. And it is not a question of philosophic interest alone, for along comes a widely advertised proposal to extend the scope of liability without fault, to cover street-accidents to citizens in general. If you are run over by an automobile you are not to have a long, expensive, and very likely futile litigation with the owner of the car, as to who was at fault, if any one; you will get your compensation out of a fund, as injured workmen do; which fund will be made up by a general levy on automobile-owners. Are you for or against such a law? and why?

If you can answer correctly, you may make a contribution to the new theory of torts. Perhaps we ought to have two talents of gold laid down

on the floor before us, to be given to him who offers the most satisfactory decision, as in the scene on the shield of Achilles.

§

Bishop's sub-title is worth a moment's notice,—"Everyday Rights and Torts." You have something to say about whether or not you are going to enter into any particular contract, but from torts there is no escape. You may be the subject of a tort at any time; torts fall alike on the just and the unjust; and, as for being the *actor* in a tort, you can never be sure of being more fortunate than the great John Rylands, the Andrew Carnegie of the English Midlands, mill-owner, coal magnate, and merchant, financing the Manchester Ship Canal and making large gifts to charity, his name perpetuated by the John Rylands Library at Manchester, which is already becoming famous; he, as I suppose, was the defendant, and the losing party, in *Rylands* v. *Fletcher*. "The law," says Holmes, "is gradually enriching itself from daily life, as it should"; and, in particular (he goes on to say,) "the great body of the law of tort has been derived. . . . from daily experience." No illustration is too homely; the dog who has had his one bite, as allowed by law, is thereafter subject to the rule in *Rylands* v. *Fletcher;* that is, you keep him at your peril.

One more example may be given. We have had much discussion of the duty (if any) of the land-owner to the trespasser known to be on the land, and even to the trespasser not known to be there; must the land-owner do more than abstain from wanton acts of injury? Particularly has there been controversy over liability for injuries to children who come to play, attracted by a railroad turntable or something else of the kind. It has been said, airily, that it is the business of parents to keep their children off the streets. Conditions in the densely crowded cities of modern times, and the necessity in so many cases of having all the adults of the family away at work during the day, have made this doctrine as obsolete as the horse and buggy. The student of today goes for his philosophy of law on duties towards children on streets and in vacant lots, not to Coke and Blackstone, but to the Reports of Playground Commissions.

This may help, also, to explain the place of the jury as the kingpin of the practical administration of the law of torts; by the aid of the jury we are "continually conforming our standards to experience." In the jury box we are supposed always to have twelve "ordinary prudent men"; and thus the standard of care we have set up,—the flexible standard of "due care under the circumstances"—the "whole duty of man" in five words—is not academic and impossible, but instead is a reasonably workable scheme,—which is as much as we can expect from any human institution.

§

Torts are a living, growing branch of law. In New York a cigarette manufacturing company used a girl's picture, without her consent, to advertise their cigarettes. She appealed to the courts in vain, and the legislature had to intervene. I venture to say that, even in the few years that have lapsed since then, professional opinion has so advanced that a statute would not now be necessary, in some States at least. The register of torts is not closed; if you are wronged, and the particular wrong you have suffered does not come within any existing rubric of the law of torts,—if it is not libel or conspiracy or malicious prosecution or intimidation of your employees or customers, if it is not negligence (most comprehensive of all headings) or deceit or assault, and so forth,—yet there may be redress; you may have the honor of establishing a new tort, the privilege of giving your name to a new leading case.

We have been fortunate in this. Dean Pound congratulates us on the lucky circumstance that although both Justice Story and Chancellor Kent wrote books covering many of the great departments of law,—and there was nothing which either touched that he did not adorn,—yet neither wrote a book on Torts. Had either done so, the law might have crystallized in the only form at that time possible; we might have had a law of torts on the lines of the civil law, not those of our own common law,—an exotic code, fixed and rigid, incapable of adaptation to the then unsuspected, and even now but half understood, demands of American life in the twentieth century.

The modern law of torts has commanded the best thought of some remarkable men; and now, fourteen hundred years after the Emperor Justinian, comes the newly-launched American Law Institute, with the gigantic task of re-stating the whole law, endowed by the Carnegie Foundation with a million dollars, and choosing Torts as one of the four subjects of the law to be taken up first. "It is probable," said the Director of this great enterprise, very lately, "that our whole law of negligence needs radical revision." It had already been said elsewhere that the doctrine of negligence is "very modern—so modern that even the great judges who sat in *Rylands* v. *Fletcher* can have had but an imperfect sense of its reach and power."

§

We may still be disturbed about the exceptions to our rule of "no liability without fault." In our law libraries shall we put our books on Workmen's Compensation in the Torts alcove or in the Contracts alcove? For classifying them under Contract, there is this to be said: "The movement of progressive societies has been in general from status to contract;" that is, instead of determining what are A's rights and duties with respect to B by considering, not any agreement between A and B, but simply what relation you find them in, as tenant and lord, or servant and master, you are instead to examine the bargain the parties have made with each other; the law ceases to enforce the incidents of a relation, and sees to it only that the parties shall do what they have mutually contracted to do. This is the very doctrine for an independent, self-reliant, liberty-loving, individualistic commonwealth. There are signs of a turning back of the current. For centuries the duties of the inn-keeper and the common carrier, and the correlative rights of the guest and the passenger, have been determined by law, largely independent of,—and indeed, if necessary, contrary to,—the bargain of the parties. To these the tendency is to add many others. Insurance is the best example; the parties nowadays have very little to say about it: whether to enter into the relation of insurer and insured is entirely for the parties to decide; but, once having entered into the relation, the law fixes almost all its incidents; what you may or may not,

and must or must not, do, does not depend on the terms of your contract, but on the law. The landlord and tenant laws of the past few years, following the war, furnish another good example. In nearly the most common contractual relation, that of employer and employee, the parties make part of the contract by their agreement, but the law steps in and annexes other terms. Viewed from this side, Workmen's Compensation has nothing to do with tort-liability, and does not belong in the law of torts at all; it is one of the terms of the contract between the parties,—not one that they have themselves put into the contract, but one that the law has put in. As it begins with contract,—an agreement of the parties,—we are going to get no help here with our street-accident compensation law, which has nothing to do with contract.

§

Having thus opened a door and politely bowed the whole law of Employer's Liability off the stage of torts, we have *Rylands* v. *Fletcher* left on our hands. A very short time ago we might have got rid of this case by saying that it is out of the current of authority, and will gradually drop from sight. In the spring of 1925 I do not feel safe in saying this. Can we find some synthesis which will include both this case and the long line of cases which say "no liability without fault?"

Any such over-riding principle would necessarily be along lines somewhat like this:

Augustine Birrell, in a short course of law lectures at one of the Inns of Court, which must have cut into the attendance at the London music-halls, remarked in his lively way:

"This then is the basis of the Law of Liability. Negligence, i.e., a breach of duty. No breach of duty, no negligence. No negligence, no liability."

"Duty" is the key-word, the center of the law of torts, as of life; fittingly so, for the law of torts has grown as life has made greater demands on it. The right of privacy, the right not to have things that violate good taste thrust upon one, are rights that would have been incomprehensible in a primitive age.

"Conduct," says one writer of today, "may, of course, be grossly wicked and yet be no breach of law at all. A man who should callously stand by and watch a child drowning in a shallow trough would arouse universal indignation; but he would have committed neither a criminal nor even a civil wrong."

This has not satisfied legal philosophers. "When a person is in danger, why," asks Bentham, "should it not be the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?"

In this case, law has not yet caught up with social morality. But if you stored a million pounds of dynamite in a warehouse immediately adjacent to a large hospital, not merely would public opinion condemn you, but if anything happened you would have a hard time of it with a jury.

§

Bishop's treatment of the larger social duties is worth a little of our attention. These are duties, he says, which we may discharge though in so doing we injure others. The illustrations he gives are,—breaking into a man's house to prevent him from killing his wife; carrying a quarantined person out of a burning house, through a crowd, and thus risking the spread of a malignant disease; blowing up a house to keep a fire from spreading; stating honestly, though mistakenly, what you think of a former servant's character. You are not liable for injuries done under these circumstances. Similarly, there is no contributory negligence in such cases as these; a mother rushes in front of a train to save her child's life; an engineer sticks to his post to save the lives of his passengers.

It will be noticed that all these illustrations involve a purely negative principle,—the law excuses you for what you have done; it recognizes a right in you; nothing is said about any duty, as to save life, or to refrain from building a spite fence. To have suggested this in 1889, when Bishop wrote, would have been premature,—that is, would have been bad law. Perhaps we are getting ready for a positive standard, embodying an entirely new social ideal,—a duty owed to society to come up to a fair level of consideration for others; a faint but courageous response to the glorious challenge of the Roman law, "to live honorably, not to injure another, and to render unto every man his own"; another small advance on the age-long journey towards the Golden Rule, of doing unto others as we would be done by.

§

We are accustomed to think of a whole class of what we call moral obligations, as distinct from obligations enforceable by law. What we are talking about just now is taking another small bit out of the domain of moral obligations and transferring it to the domain of legally enforcable obligations. Here we shall have to go very carefully. We must not put everything under the direction of the State; we are to balance advantages and disadvantages,—how much shall we yield to the opponents of factory legislation and Workmen's Compensation? How much of what is selfish and hard must we leave untouched, to avoid the fatal alternative of turning our whole lives over to society to manage for us?

We are back to Workmen's Compensation, then; if it belongs in our field, it is to be referred, not to charity in its narrow sense,—on the principle of transferring a loss from one who cannot afford it to one who can,—but to a duty growing out of a relation which historically amounted to taking the apprentice into the master's home to feed, lodge, clothe, educate, and treat as a member of the family, answering for his torts, and being responsible for his well-being. And it may be that on a wider view of social duty we may even bring *Rylands* v. *Fletcher* within our scope.

§

We may now at least appraise more correctly a sentence of a German jurist which is likely to be taken up by the ribald; law, he said, is a minimum ethic. It has been declared, upon high authority,—that of Blackstone himself,—that Christianity is a part of the common law of England; and a similar statement has been made in the United States. Once when the remark was repeated in an argument in court, a future Lord Chancellor whispered to the barrister who was sitting next to him, "Did you ever draw an indictment against a man for not loving his neighbor as him-

self?" This is well enough, but a man's reach should exceed his grasp, said Browning. Ibsen's Master-Builder built higher than he could climb. King Arthur, said the traitor who hated him, bound his knights by such strait vows it were a shame a man should not be bound by, yet the which no man can keep. The temple of Justice is the Greek temple set on a hill,—the eye follows the gleaming columns upward until their heads are lost in the clouds.

§

Negligence does not operate in a vacuum,—it has to do with "conduct, not a state of mind"; it means neglect of a duty; that is, a failure in a relation in which we are to another; thence, from the relation of one individual to another,—simply as two individuals,—we move on to social relations, and condemn as negligent, and a tort, a violation of those duties which society as such imposes on us in our relations with others,—a violation which is anti-social. Our philosophy is changing; the individualist of yesterday asked, with an air of finality, "Am I my brother's keeper?" The thoughtful man of today is not so sure of a negative reply.

§

I seem to sense the doctrine vaguely in the writings of the statesman-like jurists of our own time. It has to do with the ever-present problem of charity in its widest sense,—the immensely difficult problem of being kind without weakening the moral fiber of your fellow-man. It is a renewal of the promise that the meek shall inherit the earth. It has an affinity with the great democratic thesis of Equality; which, as Gilbert Murray puts it, is "a doctrine essentially religious and mystical, continually disproved in every fresh sense in which it can be formulated, and yet remaining one of the living faiths of men."

§

When one of the great leaders in the law of torts died in 1921, an eminent fellow-professor said of him:

"Precise and thorough as he was in his definition of legal rights and duties, Judge Smith had little respect for the man who always insists on those legal rights, and will not do more than the law requires. It was his wont each year, after showing how few positive acts were demanded by the law, to recommend the students to read the last part of the twenty-fifth chapter of Matthew, and thus call to mind the obligations above and beyond law."

§

"Inasmuch as ye did it not to one of the least of these,"—perhaps we, too, may here leave our subject.

Clever Swindlers Specialize in Victimizing Lawyers

Worthless Check Scheme Worked by Plausible Stranger in Various Parts of Country

THAT the various crooks and confidence men operating throughout the country recognize no professional exemptions from their activities is sufficiently attested by the following letters—one from a Post Office Inspector in charge, and the two others from individual lawyers:

Worthless Check Fraud Scheme

"Post Office Department,
"Cincinnati, O., Jan. 28, 1926.

"Dear Sirs:

"Clever swindlers are making a speciality of victimizing lawyers throughout the country by working a fraud scheme involving the use of worthless checks. This scheme, in substance, is as follows:

"A stranger calls at a lawyer's office and leaves a sham note for immediate collection from some party residing at a distance, explaining that this party is perfectly good for the amount and that the note would not be turned over to the lawyer for collection but for the fact that the money was sorely needed. The address which the stranger gives as that of the maker of the note is simply a fictitious address for himself or a confederate. When the lawyer's letter demanding payment of the note is received at the fictitious address a reply is made at once, enclosing a bogus check to meet the note or the major part thereof, and in the latter case promising to remit the balance in a few days. Such check, as usually prepared, is a skillful counterfeit of a cashier's check, with the amount indented by means of a protectograph, and seems above suspicion. As soon as sufficient time elapses for the letter enclosing the check to reach the lawyer's office, the stranger again calls and makes inquiry as to the progress of the collection, and when informed that the check has arrived, endeavors to prevail on the lawyer to let him have the money or part of it without delay. If successful in this respect, the stranger promptly vanishes before it can be discovered that the check is worthless. The losses thus sustained by lawyers have been heavy, running into thousands of dollars.

"It is thought that perhaps you might see fit to warn your subscribers against this fraudulent scheme by giving suitable publicity to the above information gratuitously. Attempts to work this trick, whether successful or not, should be reported immediately by wire or telephone, Government rates, collect, to the Post Office Inspector in Charge having jurisdiction in the State where the offense was committed. Such reports may be made direct or through the local postmaster. Of

course, steps should be taken to have the offenders detained by the local authorities, pending action by the post office inspectors.

"Respectfully yours,

"G. F. H. BIRDSEYE,

"Inspector in Charge."

The two following letters were received by the JOURNAL some time ago and are printed simply as illustrating the familiar method of extracting money either by impersonating a reputable lawyer or by claiming some sort of relationship with a well known member of the profession. The first is from Kentucky and the second from a state of the Northwest:

The Impersonation Game

"Gentlemen:

"For a number of years one ————, impersonating me, has fraudulently obtained from lawyers throughout portions of the United States, small sums of money, from Ten to Thirty Dollars in each instance.

"This man, a great many years ago, lived in ————, where he is respectably connected, and in that way learned of me. His method is to represent that he has been robbed and unable to communicate with this firm in time to relieve his necessities, and thereupon obtains a loan of from Ten to Thirty Dollars. In a short while thereafter I receive a letter along the lines of the one enclosed.

"For a number of years this scoundrel operated in Ohio, then in New York State, then in Pennsylvania and Maryland and now has commenced on the Pacific Coast.

"I have written a great number of letters to lawyers throughout the sections named, explaining that he was a fraud, but no one seems disposed to bring him to justice, although I have offered to attend and testify whenever he was arrested.

"It has occurred to me that a short publication in the AMERICAN BAR ASSOCIATION JOURNAL would serve to advise credulous members of the Profession of the imposition.

"I would be obliged if you would publish either this letter or a short statement to the effect that the person representing himself to be——and attempting to borrow money from lawyers, is a fraud and his importunities should be disregarded. I know this is an unusual request, but it is the only means of making known his fraudulent practices and thereby protecting the kind-hearted lawyer from his unscrupulous methods.

"This man appears to be about fifty-five years of age; he is respectably dressed, a smooth talker and quite plausible.

"Respectfully, etc."

Kinship and Tuberculosis

"Dear Sirs:

"A young man giving the name of ————, has been operating in this state representing himself as agent for the "Minneapolis Journal," and quite a number of magazines and papers, and has victimized practically all the lawyers in Watertown, S. D., and a number in Brookings, S. D., representing that he is my nephew in some places, is tubercular and obliged to do this canvassing for papers to get money to go to Arizona for his health. Also he has claimed to be a student at Vermillion, S. D.

"Some of the lawyers in the east part of the state have written me concerning him, and I have no such nephew, have never heard of the young man before. A letter from Vermillion says that he has never been in Vermillion, and a letter from the Minneapolis Journal says he has no connection with that paper. The young man also claims to be an ex-service man, which is probably as untrue as the rest of his tales. He also claimed in some of his talks to be very intimately acquainted with at least one member of the supreme court of this state. This has been ascertained to be untrue also.

"As this young man appears to visit only lawyers and will probably assume some different guise and claim some different relationships and acquaintances in some other state of the Northwest I thought possibly you would be glad to publish a word of warning in the AMERICAN BAR ASSOCIATION JOURNAL concerning him. I am therefore writing you this letter and hoping you may extend a warning to lawyers in general not to credit this young man.

"Thanking you for any courtesy you may extend to me and to the members of the bar by extending this warning, I am etc."

MEMBERSHIP IN AMERICAN BAR ASSOCIATION

Qualifications

THE constitution declares membership in good standing at the bar of any state during the last three years (part of which may have been spent in one state and part in another) a prerequisite to election.

Dues

The dues are $6.00 per year. There is no initiation fee. Member receive, as perquisites of membership, the monthly "American Bar Association Journal" and the printed annual reports of the proceedings of the Association, constituting a valuable year book of the profession in this country, in which their names are listed as members, both in the alphabetical list and in the list of members arranged by cities and towns in states.

Life Membership

Annual dues, at the option of any member, may be commuted by the payment of $200.00 at one time; and thereafter no further dues shall be payable by any such member.

Application Blanks

Blank applications for membership in the American Bar Association may be obtained by applying to any of the following:

Membership Committee

Frederick E. Wadhams, Chairman; 78 Chapel street, Albany, N. Y.
Simeon E. Baldwin, 11 Center street, New Haven, Conn.
Moorfield Storey, 735 Exchange Bldg., Boston, Mass.
Francis Rawle, Packard Bldg., Philadelphia, Pa.
Henry St. George Tucker, Lexington, Va.
Alton B. Parker, 61 Broadway, New York City.
Jacob M. Dickinson, 231 So. La Salle St., Chicago, Ill.
Frederick W. Lehmann, 600 Merchants Laclede Bldg., St. Louis, Mo.
Frank B. Kellogg, 1512 Merchants National Bank Bldg., St. Paul, Minn.
Peter W. Meldrim, 1007 National Bank Bldg., Savannah, Ga.
Elihu Root, 31 Nassau St., New York City.
George T. Page, 605 Federal Bldg., Chicago, Ill.
Hampton L. Carson, 921 Weightman Bldg., Philadelphia, Pa.
John W. Davis, 15 Broad street, New York City.
R. E. L. Saner, 1412 Magnolia Bldg., Dallas, Texas.
Charles E. Hughes, 100 Broadway, New York City.

District and State Directors

First District

Director ..... George B. Young, 116 State St., Montpelier, Vt.
Maine ..... William T. Gardiner, Gardiner, Me.
Vermont ..... Walter S. Fenton, Gryphon Bldg., Rutland, Vt.
Massachusetts ..... John E. Hannigan, 206 Barristers Hall, Boston, Mass.
New Hampshire ..... Louis E. Wyman, Merchants Bank Bldg., Manchester, N. H.
Connecticut ..... Harrison Hewitt, 121 Church St., New Haven, Conn.
Rhode Island ..... G. Frederick Frost, P. O. Box 1291, Providence, R. I.

Second District

Director ..... Frederick E. Wadhams, 78 Chapel St., Albany, N. Y.
New York ..... Martin Conboy, 27 Pine St., New York, N. Y.
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Delaware ..... Henry R. Isaacs, 604-8 Industrial Bldg., Wilmington, Del.
Maryland ..... Walter L. Clark, 1319 Fidelity Bldg., Baltimore, Md.
Dist. of Columbia .. A. Coulter Wells, Union Trust Bldg., Washington, D. C.

Third District

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South Carolina ..... Henry E. Davis, F. & M. Bldg., Florence, S. C.
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Alabama ..... Borden Burr, 1228 Brown-Marx Bldg., Birmingham, Ala.
Mississippi ..... L. Barrett Jones, 300-4 Capital National Bank Bldg., Jackson, Miss.
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Indiana ..... Earl R. Conder, State Sav. & Tr. Bldg., Indianapolis, Ind.
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Iowa ..... Wesley Martin, 713 Des Moines St., Webster City, Ia.
North Dakota ..... John Knauf, Jamestown, N. D.
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Louisiana ..... Edwin T. Merrick, 1107 Canal Commercial Bldg., New Orleans, La.
Texas ..... Walter H. Walne, Commercial Bank Bldg., Houston, Tex.
Kansas ..... Geo. T. McDermott, 504 New England Bldg., Topeka, Kan.
Oklahoma ..... Jas. R. Keaton, 600 Terminal Bldg., Oklahoma City, Okla.
New Mexico ..... Merritt C. Mechem, Albuquerque, N. M.

Seventh District

Director ..... Harold M. Stephens, 920 Continental Bldg., Salt Lake City, Utah.
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California ..... Chas. S. Cushing, First National Bank Bldg., San Francisco, Calif.
Colorado ..... Chas R. Brock, Wight Bldg., Denver, Colo.
Idaho ..... Karl Paine, 411-414 Idaho Bldg., Boise, Idaho.
Montana ..... E. C. Day, Union Bank Bldg., Helena, Mont.
Nevada ..... Frank H. Norcross, Reno National Bank Bldg., Reno, Nev.
Oregon ..... Ben C. Dey, 815 Yeon Bldg., Portland, Ore.
Utah ..... C. A. Badger, 608 Boston Bldg., Salt Lake City, Utah.
Washington ..... Marion Edwards, 1460 Dexter Horton Bldg., Seattle, Wash.
Wyoming ..... Wm. C. Kinkead, 414-421 Hynds Bldg., Cheyenne, Wyo.

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Director ..... Herbert L. Faulkner, Goldstein Bldg., Juneau, Alaska.

Ninth District

Director ..... Robbins B. Anderson, Stangenwald Bldg., Honolulu, H. T.

Tenth District

Director ..... George A. Malcolm, Supreme Court, Manila, P. I.

Eleventh District

Director ..... Henry G. Molina, San Juan, P. R.

Delaware

Delaware Holds Annual Meeting

The annual meeting of the Delaware State Bar Association was held on Friday, January 8th. Josiah Marvel, Esq., who has been President of the Association for three years, had expressed a keen desire to be relieved of further duties in this behalf, but his desires proved unavailing and the officers elected were as follows: President, Josiah Marvel, Wilmington; First Vice-President, William F. Smalley, Wilmington; Second Vice-President, Henry Ridgely, Dover; Third Vice-President, Charles W. Cullen, Georgetown; Secretary, Charles C. Keedy, Wilmington; Treasurer, Thomas C. Frame, Jr., Dover.

Illinois

Lawyers and Legislatures

President John R. Montgomery of the Illinois State Bar Association, in a New Year's message to the members, calls attention to the fact that half of the Illinois Senate and all of the House are to be elected this year, and expresses the hope that many members of the State Bar Association will stand for election. "Our situation," he states, "calls for the conservation of useful laws, the prevention of the multiplication of those which will prove useless, and the substitution of well-considered statutes for those which have been outgrown. For this work no citizens are better fitted than lawyers of education and experience. . . . It is an exceptional opportunity to perform an honorable service. We all hope for a general response to this call of duty."

The Illinois State Bar Association has recently gotten out a reprint edition of the first volume of the "Laws of the Northwest Territory," an important historical publication which has long been out of print. Members both of the bar of Indiana and Illinois have manifested great interest in the work and the Secretary has received numerous letters of commendation which have been passed on to the Association's Committee on Legal History, through its Chairman, Mr. George A. Lawrence of Galesburg.

Indiana

Indiana Bar Activities

The Second District Bar Association of Indiana was organized at a meeting held at Vincennes on December 21. The following officers were elected: President, John C. Chaney, Sullivan; Secretary, S. G. Davenport, Vincennes; Treasurer, Flavian Seal, Washington. Vice-Presidents—Daviess County, C. K. Tharp, Washington; Green County, Cyrus Davis, Bloomfield; Knox County, C. B. Kessinger, Vincennes; Martin County, Fabian Givin, Shoals; Monroe County, Robert W. Miers, Bloomington; Morgan County, J. C. McNutt, Martinsville; Owen County, Theodore Slinkard, Spencer; Sullivan County, W. R. Nesbit, Sullivan. Addresses were made by President George O. Dix of the State Bar Association and by William A. Pickens, Vice-President of the organization. President Dix stressed the importance of higher qualifications for admission to the bar.

Secretaries of State and Local Bar Associations will confer a favor by sending the Journal news of the interesting and important activities of their organizations for publication in this Department.

Address all communications to American Bar Association Journal, Room 1612 First National Bank Building, 38 South Dearborn St., Chicago, Ill.

The Eighth District Bar Association held its first meeting since its incorporation at Muncie on December 5, 1925. President Dix of the State Bar Association also addressed this meeting, and Mr. Arthur W. Brady of Anderson spoke on "Liberty with Order."

The Indianapolis Bar Association elected the following officers at a meeting held on January 16: President, James M. Ogden; Secretary, John W. Kern. The meeting was designated "State Bar Association Night," out of courtesy to the officers of the Indiana State Bar Association who were present as guests. President Davis of the Indianapolis Association introduced President George O. Dix of Terre Haute, President of the state organization, who spoke on "Bar Organization." He pointed out particularly that effective means must be found for raising the standard of educational requirements for admission to the bar in Indiana.

Iowa

Iowa Association to Publish Magazine

At a recent meeting of the Executive Committee of the Iowa State Bar Association plans were adopted for the publication of a quarterly magazine devoted to the affairs of the organization. Secretary Clyde H. Doolittle announces that the first number of the magazine will appear witthin the next two or three months.

Plans for the next annual meeting are well under way and among those who will appear on the program are Hon. Carrington T. Marshall, Chief Justice of the Ohio Supreme Court; Hon. W. D. Evans, Justice of the Iowa Supreme Court; J. R. Files of the Fort Dodge Bar, and J. E. Cross of the Newton Bar.

Headquarters of the Association were moved to Des Moines on February 1. All communications should henceforth be addressed to Clyde H. Doolittle, Secretary, Des Moines National Bank, Des Moines, Iowa.

Massachusetts

Boston Bar's Experiment

The Year Book of the Bar Association of the City of Boston, which has just been received, shows that organization in a flourishing condition with 1,136 members, including 91 honorary. The report of the Treasurer shows a healthy financial condition, with receipts well in excess of disbursements, not to mention a fair sized amount of invested funds in the hands of the Treasurer. The report of the Council calls particular attention to the change in the Constitution and By-Laws of the Association, under which members who have been admitted to the Bar for less than ten years, are required to pay no initiation fee to the Association, and after election are called upon to pay only dues of $2.00 for the first two years, and half of the regular dues after the first two years until the expiration of the ten year period of practice.

"It was hoped in this way that younger members of the Bar would be interested in the work of the Association immediately upon their entrance into professional life," the Report of the Council states, "and would not feel that the Association was something in which they had no interest until they had been some time at the Bar. It was also provided that a general invitation might be extended to any persons to become a member of the Association at any time in the first year of their entrance to the Bar. Acting in accordance with the permission thus given through these amendments we extended an invitation to the new members of the Bar.

"A hundred and six accepted the invitation, of whom actually ninety-three paid their dues and became regular members. The outcome of this interesting experiment will be looked forward to with interest, and we hope that in this way not only the Association will recruit its numerical strength, but that it will be able to reach the younger men at the Bar, to whom in the future we must look for the maintenance of our standards and the progress of our laws."

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ed as the book is found in the collections.

The Bar Bulletin, issued by the Boston Association, thus speaks of another interesting experiment:

"The experiment, begun in November, 1924, of holding a Bench and Bar Night of the Association, was repeated on December 9, 1925. About four hundred and thirty attended—almost one hundred more than in 1924. Six out of the seven judges of the Supreme Judicial Court, and many judges of the Superior Court and other courts, attended. George B. Nutter, President of the Association, presided. Speeches were made by Chief Justice Bolster of the Municipal Court of the City of Boston, George L. Mayberry, the retiring president of the Massachusetts Bar Association, and Frederick W. Mansfield, a member of the Judicial Council. Then followed the lantern slides of "Caricatures in the Law," exhibited by Richard W. Hale. The evening ended with the photoplay "Alexander Hamilton" as produced by the Yale University Press and distributed by the Pathe Exchange, Inc.

"The two experiments with the Bench and Bar Night seem to justify the hope that it will become an annual occasion and that experience will make it possible to develop the details of the plan in such a way as not only to maintain the interest, but to improve some of the details of the meeting (which occasionally present practical difficulties where so large a number of men gather)."

Missouri

Stimulating Professional Interest

"To combat the universal criticism that the Bar at large displays but lukewarm interest in Association activities, General John T. Barker, President of the Missouri Association, has initiated a novel and apparently successful plan to stimulate and arouse professional interest in the work and purposes of that Association. Recognizing that the Bar outside of St. Louis, Kansas City, and St. Joseph has evinced but scant interest in Association affairs, he has organized a series of district meetings of the local Bar in the various parts of the state. The result has already been a revival of interest and a decided increase in membership.

"On November 30th last a meeting was held at Kirksville with an attendance of more than one hundred fifty lawyers, together with a number of Circuit Judges, some members of the Supreme Court, and, we understand, substantially all the candidates for judicial office. Mr. R. R. Brewster of this city and Judge Henry S. Priest of St. Louis spoke on behalf of the Association. Pursuant to this plan on February 27th another meeting will be held in Springfield, where the Hon. Henry L. Jost of Kansas City and Judge A. D. Nortoni of St. Louis will speak. Other meetings scheduled: Poplar Bluff on March 29th; Columbia on May 1st.

"The result of the first meeting has been highly gratifying. Of the large attendance not more than five per cent have ever before shown any interest in the Association. If the other district conventions are as successful, the annual meeting in Kansas City next October promises to be the most numerously attended of any in the history of the Association."—Kansas City Bar Bulletin.

Nevada

Nevada Bar's Annual Meeting

Prince A. Hawkins, member of the law firm of Price & Hawkins, of Reno, was elected president of the Nevada State Bar Association at the annual meeting of that organization, in its concluding session on Jan. 16. H. R. Cooke of Reno, was elected first vice-president; T. A. Brandon of Winnemucca, second vice-president; John D. Hoyt, Reno, secretary, and E. L. Williams, Reno, treasurer.

The legislative council, made up of one attorney from each county in the state, was elected as follows:

E. F. Lunsford, Washoe, chairman; John M. Chartz, Ormsby; A. L. Haight, Churchill; Howard Browne, Lander; George A. Montrose, Douglas; Fred L. Wood, Lyon; Roger Foley, Esmeralda; A. S. Henderson, Clark; W. D. Hatton, Nye; L. A. Langwith, Humboldt; William Boyle, Storey; J. H. White, Mineral; Morley Griswold, Elko; Edgar Eather, Eureka; A. L. Scott, Lincoln; H. W. Edwards, White Pine.

The indeterminate sentence law was one of the principal subjects discussed at this meeting, Frank H. Norcross speaking strongly in favor of the law, while James D. Finch spoke against it, declaring that in his opinion, it was unconstitutional. Nearly all the attorneys present took part in the discussion and it was finally decided to refer the question to a special committee to be appointed later by the president.

Six cases were called to the attention of the grievance committee during the year, that committee reported, and only one appears likely to be prosecuted. It was the case of an attorney who accepted a fee in a mining patent case and then failed to perform the work called for in the contract. The other cases were of minor importance, and all but one were straightened out.

The annual scholarship fund of $100 to a University of Nevada student will hereafter be in the nature of a permanent loan, and not an outright gift, it was decided, the student receiving the scholarship to return it whenever possible. The association went on record as being in favor of an increase in the salaries of federal judges and also instructed the secretary to inform the Nevada congressional delegation that the Nevada Bar Association favored a permanent official court reporter for the United States district court at Carson.

Ohio

Improved Educational Standards

President Newton D. Baker, of the Cleveland Bar Association, has mailed the following letter to Chief Justice Marshall:

"Jan. 7, 1926.

"My Dear Chief Justice:

"At a meeting of the Cleveland Bar Association held at the Hotel Cleveland on the evening of Tuesday, January 5th, a motion was made and unanimously carried, directing me, as President of the Bar Association, to convey to you, and, through you, to the Supreme Court, the approval of the Bar of this county of the action of the Court in raising the collegiate requirement for law students.

"The announcement recently made that one year of collegiate work, and from June, 1927, two years of collegiate work, would be required, gives genuine satisfaction to our Bar and we desire the Court to know of our appreciation of their effort to advance the standard of legal requirements.

"With great respect, believe me, on behalf of the Cleveland Bar Association,

"Sincerely yours,

"Newton D. Baker, President."

Questionnaire for A. B. A. Members

1. **Are you going to the Annual Meeting at Denver, Colorado, July 14, 15, 16, 1926?**.....
2. **Do you intend to take a vacation trip after the meeting is over?**.....
3. **Would you be interested in joining a special American Bar Association party for a tour through one or more of the National Parks?**.....
4. **If so, check place or places in which interested:**
   - **(a) Yellowstone Park**.....
   - **(b) Glacier Park**.....
   - **(c) Zion Park (Southern Utah)**...
   - **(d) Yosemite Park and Pacific Northwest**.....

Name .....

Address .....

Send to William P. MacCracken, Jr., Secretary,

209 South La Salle Street, Chicago, Ill.